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## TORT AND IMPLIED CONTRACT LIABILITY OF THE FEDERAL GOVERNMENT

By LESLIE L. ANDERSON\*

### LIABILITY ON CONTRACT AND TORT

CONGRESS AND the executive department have gone so far in extending the sphere of federal governmental activity, as has the Supreme Court in construing the Constitution in the light of changing ideas about government, that it has become desirable to make inquiry as to whether protection to the individual is keeping reasonably apace in this transition. It is the purpose in this article to make a limited inquiry in this direction from the angle of the individual's right to recover from the government for its defaults, with particular relation to claims in tort and suit in implied contract under the Tucker Act. It also aims to suggest some protections that ought to be given at points where injustices occur. This discussion necessarily involves consideration of the eminent domain provisions of the Fifth Amendment to the Constitution.

The provisions of this Amendment set forth a principle only. While by them private property may not be "taken for public use, without just compensation," the Amendment does not provide the remedy by which such compensation is to be obtained once one's property has been taken. Nor are the constitutional provisions self-executing, so that without more a claimant, whose property the

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government has taken, may sue.<sup>1</sup> Action will not lie against the government except with its consent,<sup>2</sup> and the Amendment itself does not constitute a consent. During normal times, moreover, Congress has generally maintained a semblance of careful control over government expenditures. It has been slow to waive the immunity of the federal government from suit except where it has first reasonably determined or limited the amount of future liability. The United States has never been open to suit against it in general tort liability,<sup>3</sup> for instance, for one reason conceivably that the amount of possible tort damage might be too unpredictable, although consent has been given to sue the government in tort under some

<sup>1</sup>In a number of instances, similar provisions in state constitutions have been held to be self-executing and to constitute a waiver by the state of immunity from suit brought against it to enforce their terms. *Woodward Iron Co. v. Cabaniss*, (1888) 87 Ala. 328, 6 So. 300; *Campbell v. Arkansas State Highway Commission*, (1931) 183 Ark. 780, 38 S. W. (2d) 753; *Rose v. State*, (1942) 19 Calif. (2d) 713, 123 P. (2d) 505; *Board of Commissioners v. Adler*, (1920) 69 Colo. 290, 194 Pac. 621, 20 A. L. R. 512; *Bassett v. Swenson*, (1931) 51 Ida. 263, 5 P. (2d) 725; *People v. Kelly*, (1935) 361 Ill. 54, 196 N. E. 795; *Pelt v. Louisiana State Live Stock Sanitary Board*, (Court of Appeal, La. 1938) 178 So. 644; (1935) *Parker v. State Highway Commission*, 173 Miss. 213, 162 So. 162; (1937) *Barker v. St. Louis County*, 340 Mo. 986, 104 S. W. (2d) 371; *Dougherty v. Vidal*, (1933) 37 N. M. 256, 21 P. (2d) 90; *Morrison v. Clackama County*, (1933) 141 Ore. 564, 18 P. (2d) 814; *Chester County v. Brower*, (1888) 117 Pa. 647, 12 Atl. 577, 2 Am. St. Rep. 713; *Chick Springs Water Co. v. State Highway Dept.*, (1930) 159 S. Car. 481, 157 S. E. 842; *Nelson County v. Loving*, (1919) 126 Va. 283, 101 S. E. 406; *Johnson v. Parkersburg*, (1880) 16 W. Va. 402, 37 Am. Rep. 779; *Washington Water Power Co. v. Waters*, (C. C., D. Ida., N. D. 1910) 186 Fed. 572.

<sup>2</sup>"A sovereign is exempt from suit . . . on the . . . ground that there can be no legal right as against the authority that makes the law on which the right depends."—*Holmes, J.*, in *Kawananakoa v. Polybank*, (1907) 205 U. S. 349, 353, 27 Sup. Ct. 526, 527, 51 L. Ed. 834, 836. *Lynch v. United States*, (1933) 292 U. S. 571, 54 Sup. Ct. 840, 78 L. Ed. 434; *Chisholm v. Georgia*, (1792) 2 Dallas 419, 1 L. Ed. 440; *Gibbons v. United States*, (1868) 8 Wall. 269, 19 L. Ed. 453; *Hans v. Louisiana*, (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. E. 842. Eleventh Amendment, Constitution of the United States.

As to the extent to which the federal and the various state governments have laid themselves open to suit in tort and contract, see Pound, "A Survey of Public Interests," 58 Harv. L. Rev. 909 (1945).

<sup>3</sup>"No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents," said Mr. Justice Miller in *Gibbons v. United States*, (1868) 8 Wall. 269, 274, 19 L. Ed. 453, 454; and he added in *Langford v. United States*, (1879) 101 U. S. 341, 345, 25 L. Ed. 1010, 1012, that the Supreme Court will not "subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives." In *Bigby v. United States*, (1902) 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519, Mr. Justice Harlan suggested that no officer of the government has been given authority to commit torts, and that their authority is limited to doing lawful acts. Mr. Justice Holmes, in *United States v. Thompson*, (1922) 257 U. S. 419, 42 Sup. Ct. 159, 66 L. E. 299, said in effect that the government makes the law and therefore cannot be a wrongdoer.

circumstances.<sup>4</sup> Government contracts, on the other hand, are made only pursuant to the Constitution or to statute.<sup>5</sup> Congress is able to limit in advance the contractual liability which the government agents will be authorized to incur. In part at least because the amount of possible liability on contract claims is predictable and subject to Congressional controls in their incurrence, Congress has, in the Tucker Act,<sup>6</sup> waived the immunity of the government from suit under its contracts.

The Tucker Act provides:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable . . ."

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<sup>4</sup>(Assumption of tort liability to same extent as corporate owners while federal government operated railroads during World War I) Federal Control Act, 40 Stat. 451 (1918). See *New York ex rel Rogers v. Graves*, (1936) 299 U. S. 401, 57 Sup. Ct. 269, 81 L. E. 306. (Permitting libel in personam in admiralty for damages caused by public vessel of the United States or for services rendered to such public vessel) Public Vessels Act of 1925, 43 Stat. 112 (1925), 46 U. S. C. 781. (Authorizing suit for government infringement of patents) 40 Stat. 705 (1910), 35 U. S. C. 68. Congress sometimes provides for the administrative determination of tort claims as distinguished from judicial determination. Federal Employees Compensation Act, 39 Stat. 742 (1916), 5 U. S. C. 751, for instance. See *Dahn v. Davis*, (1922) 258 U. S. 421, 42 Sup. Ct. 320, 66 L. Ed. 696. Cf. *Panama R. Co. v. Strobel* (C. C. A. Canal Zone, 1922) 282 Fed. 52.

<sup>5</sup>"We have no officer in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law."—Miller, J., in *The Floyd Acceptances*, (1868) 7 Wall. 666, 676, 19 L. Ed. 169, 174.

<sup>6</sup>36 Stat. 1136 (1911), 28 U. S. C. 250; and 36 Stat. 1093 (1911) 28 U. S. C. 41 (20).

For an analysis of procedures in the light of the Tucker Act and otherwise for establishing claims pursuant to government contracts, see by the writer, "The Disputes Article in Government Contracts," 44 Mich. L. Rev. 211 (1945).

For a general treatment of government contracts, Grismore, "Contracts with the United States," 22 Mich. L. Rev. 749 (1924); McGuire, "Matters of Procedure under Government Contracts," (Rev. ed. 1935); Shealey, "The Law of Government Contracts," (2nd ed. 1927); Tanney, "Government Contract Law and Administration" (1930).

Congress has provided further in the Tucker Act that the federal government may be sued in the United States district courts for any of the same causes in an amount not in excess of \$10,000.

*Law to be Applied in Government Contracting*

In suits under the Act arising out of business transactions by the United States, it would seem that the government should not be obliged to inform itself of the different and unusual rules prevailing in all of the various states as to its contracts, and inquiry here should be largely confined to federal, and not to state, decisions. In *Erie Railroad Company v. Tompkins*,<sup>7</sup> Mr. Justice Brandeis stated the principle as to the law to be applied in federal courts that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."<sup>8</sup> Since government contracts are made only pursuant to the Constitution or to authority from Congress, it would follow that they should not be governed by state law and that federal law only should be applied to them. It has been so held specifically as to commercial paper issued by the government,<sup>9</sup> and some state court decisions have recognized that Treasury Regulations control as to the ownership of registered

<sup>7</sup>(1938) 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188. Notes in 22 Minn. L. Rev. 885 (1938), 86 U. of Pa. L. Rev. 896 (1938), and 24 Va. L. Rev. 895 (1938).

<sup>8</sup>Variations of problems in applying state law. *Vanderbark v. Owens-Illinois Glass Co.*, (1941) 311 U. S. 538, 61 Sup. Ct. 347, 85 L. Ed. 327; (1944) *Huddleston v. Dwyer*, 322 U. S. 232, 64 Sup. Ct. 1015, 88 L. Ed. 1246; (1940) *Fidelity Trust Co. v. Field*, 311 U. S. 169, 61 Sup. Ct. 176, 85 L. Ed. 10; (1940) *West v. American Telephone and Telegraph Co.*, 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 139. Note in 89 of Pa. L. Rev. 520 (1941); (1943) *Meredith v. Winter Haven*, 320 U. S. 228, 64 Sup. Ct. 7, 88 L. Ed. 9; notes in 39 Mich. L. Rev. 818 (1941) and 92 U. of Pa. L. Rev. 330 (1944); (1945) *McKenzie v. Irving Trust Co.*, 323 U. S. 365, 65 Sup. Ct. 405, 89 L. Ed. 389; note in 31 Va. L. Rev. 984 (1943). The United States Supreme Court attempted to advise the Supreme Court of Nebraska, (1945) *Radio Station WOW, Inc. v. Johnson*, 65 Sup. Ct. 1475, 1482, 89 L. Ed. 1397, 1403. The state Court answered back. *Johnson v. Radio Station WOW, Inc.*, (Neb. 1945) 19 N. W. (2d) 853.

<sup>9</sup>"The application of the state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain."—Douglas, J., in *Clearfield Trust Co. v. United States*, (1943) 318 U. S. 363, 367, 63 Sup. Ct. 573, 575, 87 L. Ed. 838, 842; note in 43 Col. L. Rev. 520 (1943).

United States War Savings bonds.<sup>10</sup> Neither the Supreme Court nor the Court of Claims has ever made a practice of bothering itself much about state law in government contract cases. Federal projects can be prosecuted with more facility from a central office if the national authorities are not hampered by possible variations in the law of contracts from state to state. Moreover, if state law were to control in the field of government contracting, recalcitrant state legislatures might even attempt to thwart some federal projects. The consent of the federal government to be sued in contract should, therefore, properly be construed to be one for suit under its own contract rules except as a contrary intention is clear.<sup>11</sup> A body of federal common law is inevitably to be relied upon to govern business transactions between the United States and private contractors.<sup>12</sup>

### *Implied in Law Contracts*

The Tucker Act, it will be observed, permits suits against the government on implied contracts, but does not specify whether such contracts must be those implied in fact or those implied in law, or whether both are within its purview. Contracts implied in law are not actually contracts at all, but arise under such circumstances that the courts impose liability as if they had been con-

<sup>10</sup>Murray v. Muldoon, (Ia. 1945) 20 N. W. (2d) 49; Harvey v. Rackliffe, (Me. 1945) 41 A. (2d) 455. State law will not be permitted to thwart the federal policy involved in the Sherman law. Sola Electric Co. v. Jefferson Electric Co., (1942) 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165; notes in 56 Harv. L. Rev. 814 (1943) and 41 Mich. L. Rev. 984 (1943).

<sup>11</sup>In case of a war contract made pursuant to the Congressional power to raise and support Armies, "it must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute. Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state."—Jackson, J., in *United States v. Allegheny County*, (1943) 322 U. S. 174, 182, 64 Sup. Ct. 908, 913, 88 L. Ed. 1209, 1217. See *Kemp v. United States*, (D. Md., 1941) 38 F. Supp. 568.

<sup>12</sup>Even as in the case of commercial paper issued by the United States. "And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to those federal questions."—Douglas, J., in *Clearfield Trust Co. v. United States*, *supra*, footnote 8.

tracts.<sup>13</sup> Known generally as quasi-contracts, their obligation arises in large part from moral and equitable considerations as distinguished from agreement. Certain of the same considerations that would lead Congress not to waive the immunity of the government from general tort liability apply in the case of quasi-contracts, even though the statute could probably have been construed originally to permit the courts to take jurisdiction over them. They are surely of the contracts family. During World War II, it has become apparent that making technical distinctions between the two types of implied contracts might impede speedy war procurement; and suit on contracts implied in law in the field of war contracting came to be specifically permitted by the Contract Settlement Act of 1944.<sup>14</sup> In any event, contracts implied in law have been held not to be included within the purview of the Tucker Act.<sup>15</sup> Government contracts under the statute must be either express or implied in fact.

It is difficult to justify on principle the government's unwillingness in normal times to hold itself accountable to the full standard of fairness and morality to which private parties are held. Treatment of the excluded category of contracts implied in law, moreover, has seemed to be not without some taint of inconsistency. Where the government has occupied the property of a claimant without first entering into a lease in writing, it has been treated

<sup>13</sup>Woodward, "Quasi Contracts" (1912), Sec. 1. Williston and Thompson, "Williston on Contracts" (Rev. ed. 1936), Sec. 3. "It has long been settled by decisions of this court that the word 'contracts' in Sec. 10 of Article I of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent' [express or implied] to its terms is of its very essence."—Clarke, J., in *Crane v. Hahlo*, (1922) 258 U. S. 142, 146, 42 Sup. Ct. 214, 215, 66 L. Ed. 514, 517.

<sup>14</sup>58 Stat. 658 (1944), 41 U. S. C. 101. After setting forth procedures for prosecution of claims under war contracts (Secs. 13 and 14), the Act provides in Sec. 17: "(b) Whenever any formal or technical defect or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract."

<sup>15</sup>*United States v. Minnesota Investment Co.*, (1926) 271 U. S. 212, 217, 46 Sup. Ct. 501, 503, 70 L. Ed. 911, 913; *Merritt v. United States*, (1925) 267 U. S. 338, 45 Sup. Ct. 278, 69 L. Ed. 643; *Baltimore & Ohio Rd. Co. v. United States*, (1923) 261 U. S. 592, 43 Sup. Ct. 425, 67 L. Ed. 816; *Sutton, Trustee v. United States*, (1921) 256 U. S. 575, 41 Sup. Ct. 563, 65 L. Ed. 1099; *American LaFrance Fire Engine Co. Inc. v. Borough of Shanandoah*, (C.C.A. 3rd, 1940) 115 F. (2d) 866.

as an occupant under a lease implied in fact.<sup>16</sup> Where its occupancy has been under a written lease not mentioning the subject of waste, it has been held that an agreement implied in fact not to commit waste should be read into the transaction.<sup>17</sup> On the other hand, where the established law of Ohio, where premises were situated, was that a lessee holding over after the expiration of a lease for a year was bound for another year at the option of the lessor despite the lessee's intention not to be bound for the entire new year,<sup>18</sup> the courts have refused to apply the rule against the government since Ohio courts had referred to it as an obligation implied in law.<sup>19</sup> This latter decision was made prior to *Erie Railroad Company v. Tompkins*, *supra*, and the position could easily have been taken that the courts were simply unwilling to apply state law. It is doubtful that the decision would have been different had no mention been made of the subject of obligations implied at law but the Ohio rule had been imposed by an Ohio statute.

#### *Nature of Implied in Fact Contract*

The contract implied in fact is based upon an agreement between the parties. It is the sort of thing to which Congress is

<sup>16</sup>*Willink v. United States*, (1903) 38 Ct. Cl. 693; *Mills v. United States*, (1884) 19 Ct. Cl. 79; *Johnson v. United States*, (1872) 8 Ct. Cl. 243; *Johnson v. United States*, (1868) 4 Ct. Cl. 248. Cf. *Eastern Building Corp. v. United States*, (1942) 96 Ct. Cl. 399.

<sup>17</sup>*United States v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65 (1876); *Italian National Rifle Shooting Society v. United States*, 66 Ct. Cl. 418 (1928); *New Rawson Corp. v. United States*, (D. Mass., 1943) 55 F. Supp. 291; 23 Comp. Gen. 477 (1944). The government took an owner's steamer on a trial voyage preliminary to purchasing it, with an oral agreement to pay for it should the steamer be lost on the trip. It was lost through no fault of the government. The express contract to pay for the steamer failed for want of a writing; but the Supreme Court recognized a simple bailment for hire in the relationship between the parties, and declared in essence that there was an implied contract to abide by the usual incidents of such a relationship. Thus the government would have been liable for the value of the steamer had the loss occurred from negligence. *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 18 (1877). Subject discussed in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 395, 59 Sup. Ct. 521, 83 L. Ed. 792 (1939); *Petition of S. R. A., Inc.*, (Minn.) 18 N. W. (2d) 442 (1945).

<sup>18</sup>*Bumiller v. Walker*, (1917) 95 Ohio St. 344; *Baltimore & Ohio Rd. Co. v. West*, (1897) 57 Ohio St. 161.

<sup>19</sup>*Goodyear Tire & Rubber Co. v. United States*, (1928) 276 U. S. 287, 48 Sup. Ct. 306, 72 L. Ed. 575. Cf. variations in government lease cases: *Raymond Commerce Corp. v. United States*, (1941) 93 Ct. Cl. 698; *Freedman's Savings & Trust Co. v. United States*, (1880) 16 Ct. Cl. 19. See also *Leiter v. United States*, (1926) 271 U. S. 204, 46 Sup. Ct. 477, 70 L. Ed. 906; *Bradley v. United States*, (1878) 98 U. S. 104, 25 L. Ed. 105; *Reed Smoot v. United States*, (1903) 38 Ct. Cl. 418; *New York Central Railroad v. United States*, (1886) 21 Ct. Cl. 468; *McCullum's Case*, (1881) 17 Ct. Cl. 92.



able to give advance authorization. Unexpected state rules cannot generally be imported into it. An intention must appear on both sides. The mental elements constituting a bargain must be found, even as it must appear in cases of express contract. The person conferring the benefit on the government must expect to be paid for it,<sup>20</sup> and the government to pay.<sup>21</sup> Since there is no valid written agreement, the intention must be found in the circumstances surrounding the transaction.<sup>22</sup> The mental element is often obscure. Yet in government contracting, principles set forth in the Constitution, as the eminent domain protective principle of the Fifth Amendment referred to already, or in statutes, or arising out of recognized changed conditions and public attitudes, help in arriving at a conclusion as to what one would expect to be intended in the absence of facts otherwise negating the intention of one of the parties to do some certain thing.

It is an every-day occurrence in private enterprise for shoppers to lift items from counters in stores and for clerks to reach out for payment, with hardly a word passing between them. Transactions of purchase and sale take place regularly without advance discussions as to terms. Custom constitutes part of the surrounding circumstances and supplies what has been without expression in language. Society expects one to intend payment for what he takes rather than to do a wrongful act. There is no less reason to expect that government will likewise expect to pay for what it takes, and especially when custom is reinforced with some principle which

<sup>20</sup>*Coleman v. United States*, (1893) 152 U. S. 96, 14 Sup. Ct. 473, 38 L. Ed. 368, suggesting, however, that the circumstances under which a party performs may justify a reasonable expectation of payment, and that from this a promise to pay will be implied. If it is specified in advance of performance that the government will not pay, there will be no recovery in implied contract. *United States v. McDonald* (C. C. A. 9th, 1896) 72 Fed. 898. See *Lombard v. Rahilly*, (1914) 127 Minn. 449, 149 N. W. 950.

<sup>21</sup>Where one builds or repairs a structure on land belonging to the government without its consent, the government is not liable even though it sees fit to use the structure instead of tearing it down, *United States v. Pacific Railroad*, (1887) 120 U. S. 227, 7 Sup. Ct. 490, 30 L. Ed. 634; *Sutton Trustee v. United States*, (1921) 265 U. S. 575, 415 Sup. Ct. 563, 65 L. Ed. 1099. Cf. variations of cases, *Karon v. Kellogg*, (1935) 195 Minn. 134, 261 N. W. 861; *Canal Bank v. Hudson*, (1884) 111 U. S. 66, 4 Sup. Ct. 303, 28 L. Ed. 354; *Green v. Biddle*, (1823) 8 Wheat. 1, 5 L. Ed. 547; *Armstrong, Receiver v. Ashley*, (1907) 204 U. S. 272, 27 Sup. Ct. 270, 51 L. Ed. 482.

<sup>22</sup>1 Williston and Thompson, "Williston on Contracts," (Rev. ed. 1936) Sec. 3. "A contract implied in fact is one inferred from the circumstances or acts of the parties . . ."—Sutherland, J., in *Klebe v. United States*, (1923) 263 U. S. 188, 192, 44 Sup. Ct. 58, 59, 68 L. Ed. 244, 247. "A contract implied in fact requires a meeting of the minds, just as much as an express contract. The difference between the two is largely in the character of the evidence by which they are established."—Dibell, C., in *Lombard v. Rahilly*, (1914) 127 Minn. 449, 450, 149 N. W. 950.

has sanctity because it is in the Constitution. Taking under the power of eminent domain is considered later in this article. It is mentioned at this point because it is so intimately related to the subject at hand. The power of government to take private property certainly arises without regard to any law of contracts or purchase and sale;<sup>23</sup> but in practice, the right to payment for what the government has taken developed in the United States at least in general conformity with that law, and distinctions between many eminent domain cases are explainable on the basis of contract rules.

Various details of a particular implied contract may be expressed in a writing which is not complete enough to constitute an express contract. Or a writing may fail as an attempted express contract because there has not been an adequate compliance with some of the few formalities provided by the statutes and peculiar to government contracting; but it may still serve as evidence of the intentions of the parties. One of such statutes is that which requires advertising to precede purchases of supplies and services, except where a contract is to be made for personal services or where there is a public exigency which requires immediate delivery or performance.<sup>24</sup> It may be observed parenthetically that both war with its urgent need for help from private enterprise<sup>25</sup> and a depression requiring the government to put many jobless men to work at an early date<sup>26</sup> are public exigencies. Delivery or performance with relation to them at a date as reasonably soon as practicable under the circumstances satisfies the requirement of a need for immediate performance.<sup>27</sup> Delivery within thirty days has been treated in such cases as clearly immediate enough under facts there existing so that it is proper to purchase without advertis-

<sup>23</sup>Lenhoff, "Development of the Concept of Eminent Domain," in 42 Col. L. Rev. 596 (1942). *United States v. A Certain Tract*, (S. D. Ga., 1942) 44 F. Supp. 712, 715; *State v. Flach*, (1942) 213 Minn. 353, 356, 6 N. W. (2d) 805, 807; *State v. Severson*, (1935) 194 Minn. 644, 261 N. W. 469.

<sup>24</sup>R. S. 3709, 41 U. S. C. 5.

<sup>25</sup>*American Smelting and Refining Co. v. United States*, (1922) 259 U. S. 75, 42 Sup. Ct. 420, 66 L. Ed. 833; *Totten, Administrator v. United States*, (1875) 92 U. S. 105, 23 L. Ed. 605; *The Stevens Case*, (1866) 2 Ct. Cl. 95. Further exemption from advertising in World War II procurement. *First War Powers Act*, 55 Stat. 838 (1941), 50 U. S. C., App. 601 et seq; E. O. 9001, December 27, 1941, 6 Fed. Reg. 6787, as amended by E. O. 9296, January 3, 1943, 8 Fed. Reg. 1429.

<sup>26</sup>*Good Roads Machinery Co. v. United States*, (D. Mass., 1937) 19 F. Supp. 652. Cf. 14 Comp. Gen. 875 (1935) where a contracting officer on a Civil Works project waited until an emergency occurred which he should have known well in advance would inevitably occur and then attempted to purchase without advertising. See *McKeimey v. United States* (1868) 4 Ct. Cl. 537.

<sup>27</sup>*American Smelting and Refining Co. v. United States*, *supra*, footnote 25.

ing.<sup>28</sup> Some statutes specifically permit some purchases in varying small amounts without advertising by specified government departments and agencies.<sup>29</sup> Contracts are generally required to be in writing by other statutes. A statute as to the War Department, for instance, requires that they be in writing and signed by the parties if in an amount in excess of five hundred dollars and if not to be performed within sixty days.<sup>30</sup>

The requirements of both advertising and a formal contract are for the benefit of the government only.<sup>31</sup> Thus the statute requiring a written contract differs from a Statute of Frauds in private contract law.<sup>32</sup> While the contractor cannot hold the government to the terms of an express contract if it is not in writing,<sup>33</sup> the government can hold the contractor to its terms.<sup>34</sup> However, although the contractor may not hold the government on the express contract, he may nevertheless recover in quantum meruit on a contract implied in fact to the extent of the benefit conferred upon it or the reasonable value of the part of the agreement already performed.<sup>35</sup> Here the intention of the parties was

<sup>28</sup>*American Smelting and Refining Co. v. United States*, *supra*, footnote 25; *Good Roads Machinery Co. v. United States*, *supra*, footnote 26.

<sup>29</sup>See, for example, 54 Stat. 1109 (1940), 41 U. S. C. 6.

<sup>30</sup>46 Stat. 796 (1930), 5 U. S. C. 219.

<sup>31</sup>"Section 3709 . . . was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. 'The United States needs the protection of publicity, form, regularity of returns and affidavit (Revised Stats. Secs. 3709, 3718-3724, 3745-3747), in order to prevent possible frauds upon it by others. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the Government and not upon him.' That duty is owing to the Government and to no one else."—Black, J., in *Perkins, Sec. of Labor v. Lukens Steel Co.*, (1940) 310 U. S. 113, 126, 60 Sup. Ct. 869, 876, 84 L. Ed. 1108, 1114. Cf. *Stark v. Wickard, Sec. of Agriculture*, (1944) 321 U. S. 288, 64 Sup. Ct. 559, 88 L. Ed. 510. See also *O'Brien v. Carney*, (D. Mass., 1934) 6 F. Supp. 761; *B. F. Cummings Co. v. Bursleson*, (1913) 40 App. D. C. 500; *Champion Coated Paper Co. v. Joint Committee on Printing*, (1917) 47 App. D. C. 141; Hearing before the Committee on the Judiciary, House of Representatives, 71st Cong., 2nd Sess., on H. R. 5568, Serial 4, Part 1, pp. 16-22, 26-27; Senate Report 433, 74th Cong., 1st Sess.

<sup>32</sup>*Ackerlind, Admr. v. United States*, (1916) 240 U. S. 531, 36 Sup. Ct. 438, 60 L. Ed. 783.

<sup>33</sup>*Erie Coal and Coke Corp. v. United States*, (1924) 266 U. S. 518, 45 Sup. Ct. 181, 69 L. Ed. 417; *Gillioz v. United States*, (1944) 102 Ct. Cl. 454.

<sup>34</sup>*American Smelting and Refining Co. v. United States*, *supra*, footnote 25. *United States v. N. Y. and Porto Rico Steamship Co.*, (1915) 239 U. S. 88, 36 Sup. Ct. 41, 60 L. Ed. 161; *Emery v. United States*, (D. Conn., 1926) 13 F. (2d) 658. An analogous type of case, *Baltimore & Ohio Rd. Co. v. Groeger, Admx.*, (1925) 266 U. S. 521, 45 Sup. Ct. 169, 69 L. Ed. 419.

<sup>35</sup>In *Willard, Sutherland & Co. v. United States*, (1923) 262 U. S. 489, 494, 43 Sup. Ct. 592, 594, 67 L. Ed. 1086, 1089, Mr. Justice Butler explained that the contract was not enforceable against the government prior to any performance, but added, "By the conduct and performance of the parties, the contract was made definite and binding as to the 11,000 tons ordered and

clear from the beginning that the contractor be paid at least for what he may have delivered within the limits of the written agreement. The language used by the parties is evidence to establish the intention even though the express contract may fail for want of advertising or a writing.

On the other hand, government standard forms contain what is known as a "Changes" article, which permits the government contracting officer to order in writing certain changes in the drawings or specifications which set forth the subject matter of the contract. If the changes so ordered require an increase or decrease in the amount due under the contract, an equitable adjustment shall be made. In the event the estimated increase or decrease exceeds five hundred dollars, no change shall be ordered, by the language of the "Changes" article, except upon the approval in writing of the head of the department or his authorized representative.<sup>36</sup> An implied in fact contract problem arises occasionally where the estimated increase or decrease in cost for changes ordered exceeds five hundred dollars but no prior written approval from the head of the department or his representative has been obtained. Variations in further facts might be suggested.

The contracting officer and the contractor may disagree with each other as to whether what is ordered does in fact constitute a change or whether it is required already by the drawings and specifications. If the contractor does not remonstrate to the contracting officer but performs without protest, he will have waived any right to additional recovery by reason of his cooperation.<sup>37</sup> He

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delivered according to its terms." See also *United States v. Andrews & Co.*, (1907) 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185; *St. Louis Hay and Grain Co. v. United States*, 191 U. S. 159, 24 Sup. Ct. 47, 48 L. Ed. 130 (1903); *Saulsbury Oil Co. v. Phillips Petroleum Co.*, (C. C. A. 10th, 1944) 142 F. (2d) 27; *Gorman v. United States*, (1944) 102 Ct. Cl. 260; *W. H. Armstrong & Co. v. United States*, (1943) 98 Ct. Cl. 519.

<sup>36</sup>The requirement that change orders involving an estimated increase or decrease of more than five hundred dollars be approved in writing by the head of the department or his representative necessarily would hamper a large procurement program where speed is necessary. Consequently, it does not appear in most war contracts during World War II.

<sup>37</sup>*Silberblatt & Lasker, Inc. v. United States*, (1944) 101 Ct. Cl. 54; *McGlone v. United States*, (1942) 96 Ct. Cl. 507; *American Bridge Co. v. United States* (W. D. Pa., 1938) 25 F. Supp. 714. Moreover, the specifications to the contract may contain a clause making the government contracting officer the interpreter of the drawings and specifications. If there is such a clause, the contractor will not be able to recover even though he does protest. Sometimes government contracts contain a kind of Disputes article that will permit him to appeal to the head of the government department or his authorized representative within 30 days. Sometimes, this right of appeal is taken away either by restricted language in the Disputes article or by language in the specifications making the interpretation by the contracting officer final.

has performed work in disregard of the expressed intention of the government without first asserting his own intention and declaring a breach to exist. If he protests but feels obliged to perform the additional work to protect himself even though the contracting officer refuses to give him a written change order, it has been held that he will be able to recover for it in implied contract.<sup>38</sup> One difficulty with that solution is that the standard "Changes" article requires the written approval of the additional cost by the head of the department, and the solution disregards the approval. If the head of the department stands by with full knowledge of the work which has been ordered, however, the problem seems not difficult by analogy to other cases of benefit conferred by oral arrangement. The insistence of the contracting officer and the silent acquiescence of the head of the department in the conferring of the benefit by the contractor would, by custom, be expected to include an intention that the contractor be reimbursed for his additional expense. The parties have had a difference of opinion, and the government position should be that it will abide by whatever the courts finally decide the proper interpretation of the contract to be.

Suppose, again, that both parties agree that what is ordered is a change involving an increase of over five hundred dollars, but the contractor still does the work by order of the contracting officer but without waiting for the prior written approval of the head of the department. The position the courts would take at this point is not too well established. If the head of the department does not know of the additional cost incurred by the contractor until after the work has been performed, it is clear that there would be no right of recovery on any theory. The purpose of requiring the approval of the head of a department is directed toward keeping control over subordinate officers by officials having the ultimate responsibility of the project.<sup>39</sup> This reason in itself would seem to be satisfied where the department head stands by and knows the additional work is being performed even in the absence of any written approval by

<sup>38</sup>Davis and Fowler, *Trustees v. United States*, (1936) 82 Ct. Cl. 334. If the contracting officer's interpretation was correct, the contractor will not have the additional recovery. *Diamond v. United States*, (1943) 98 Ct. Cl. 428. The contractor may choose to hold to his position against the contracting officer, cease the work, and declare a breach because of the government's insistence upon the additional work without giving him a change order. In doing so, his risk is that the court may determine him to be in error and to have breached the contract. Occasionally, a change order does not effect the cost of performance, as when it calls for a change in the color of paint to be used.

<sup>39</sup>*Filor v. United States*, (1869) 9 Wall. 45, 19 L. Ed. 549.

him. It may be inquired further, though, whether the requirement of an approval in writing should not be treated as an important procedural step in pressing a claim for an additional sum. The Supreme Court has once refused extra recovery on the ground alone of the failure of a written approval.<sup>40</sup> The reason, however, seems a flimsy one for denying recovery where the government has received the benefit. The Court in that case sustained the position of the Court of Claims below. However, in a more recent decision, the Court of Claims has quite reversed its previous position;<sup>41</sup> and it is believed the Supreme Court might hereafter take the stand that recovery should not be denied simply on the ground of non-compliance with the evidentiary requirement that a change order or approval be in writing.

The authority of the government officer to receive the benefit or performance for the government must be established in some manner, however, before recovery in implied in fact contract will be allowed. Without authority to make an express contract, he has no authority to bind the government in implied contract.<sup>42</sup> Mere benefit conferred is not in itself a basis for recovery against the

<sup>40</sup>"In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract."—Lamar, J., in *Plumley v. United States*, (1903) 226 U. S. 545, 547, 33 Sup. Ct. 139, 140, 57 L. Ed. 342, 344. Cf. *Seim v. Independent District of Monroe*, (S. Dak., (1945) 17 N. W. (2d) 342. A change order cannot bind the government to pay more than is specified in the statute for the project to be performed. *Shipman v. United States*, (1883) 18 Ct. Cl. 138; *Trenton v. United States*, (1876) 12 Ct. Cl. 147; *Curtis v. United States*, (1866) 2 Ct. Cl. 144.

<sup>41</sup>"We recognize that the decision of the Supreme Court of the United States in *Plumley v. United States*, 226 U. S. 545, is contrary to what we have said. We see no distinction, in principle, between that case and the cases of *United States v. Andrews* and *St. Louis Hay and Grain Co. v. United States*, discussed above. All the authorities in comparable legal situations are in accord with the latter cases, and we think it is our duty to follow this general trend of authority, which leads to what we regard as a just decision, rather than the *Plumley* case, which seems to stand alone."—Madden, J., in *W. H. Armstrong and Co. v. United States*, (1943) 98 Ct. Cl. 519, 530.

<sup>42</sup>*Sutton, Trustee v. United States*, (1921) 256 U. S. 575, 41 Sup. Ct. 563, 65 L. Ed. 1099; *United States v. North American Transportation and Trading Co.*, (1919) 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935; *Beach v. United States*, (1912) 226 U. S. 243, 33 Sup. Ct. 20, 57 L. Ed. 205; *Bigby v. United States*, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519 (1903); *Rankin v. United States*, (1943) 98 Ct. Cl. 357. Or if an express contract covers a certain subject, conflicting rights cannot be implied as to the same subject. *Hawkins v. United States*, (1877) 96 U. S. 689, 24 L. Ed. 607; *Board of Trustees of National Training School v. O. D. Wilson Co., Inc.*, (U. S. Ct. App., D. C., 1943) 133 F. Supp. 399.

United States.<sup>43</sup> With so many government employees as there are, close controls over them are not feasible. As a departure from the law of agency in private contracting, the United States will not be bound by the mere apparent authority of its agent. Unless the actual authority of a government agent is established, no recovery may be had whether on a theory of express or implied contract.<sup>44</sup> The authority itself, however, may be implied from some other authority that has been granted.<sup>45</sup> Although it has been said that the government will not be estopped by the acts of its agents and will not be bound by their laches,<sup>46</sup> in some cases their laches have been held to bind the government.<sup>47</sup> Moreover, the burden upon the contractor to make sure of the government contracting officer's actual authority stands in the way of speedy procurement. The Contract Settlement Act of 1944 accordingly provided for fair compensation to persons furnishing or arranging to furnish war materials to the government with relation to World War II in reliance upon apparent authority.<sup>48</sup> Compensation is made under the Contract Settlement Act even though no materials are furnished or

<sup>43</sup>*Baltimore & Ohio Rd. Co. v. United States*, (1923) 261 U. S. 592, 43 Sup. Ct. 425, 67 L. Ed. 816; *Eastern Extension, Australasia & China Telegraph Co. v. United States*, (1920) 251 U. S. 355, 40 Sup. Ct. 168, 64 L. Ed. 305; *United States v. North American Transportation and Trading Co.*, *supra*, footnote 42. *Hooe v. United States*, (1910) 218 U. S. 322, 31 Sup. Ct. 85, 54 L. Ed. 1055.

<sup>44</sup>*Whiteside v. United States*, (1876) 93 U. S. 247, 23 L. Ed. 882; *United States v. Foster*, (C. C. A. 8th, 1942) 131 F. (2d) 3; *United States v. Christensen*, (E. D. Ill., 1943) 50 F. Supp. 30; *United States v. Gudewicz*, (E. D. N. Y., 1942) 45 F. Supp. 787.

<sup>45</sup>Thus from a duty imposed by Congress upon a public official to store certain materials for which he has no storage space may be implied authority to bind the government for the rental of such space. *Rives v. United States*, (1893) 28 Ct. Cl. 249.

<sup>46</sup>"... the government is not responsible for the laches, however gross, of its officers."—*Miller, J.*, in *Gibbons v. United States*, 8 Wall. 269, 275, 19 L. Ed. 453, 454 (1869). "... the real authority of the agent is defined by a public statute, of which every person is bound to take notice. From the latter fact it follows that there can be no foothold for an estoppel in the case."—*Berry, J.*, in *Reed, as Warden v. Seymour*, (1877) 24 Minn. 273, 280.

<sup>47</sup>Dealing with commercial paper, Mr. Justice Douglas said in *Clearfield Trust Co. v. United States*, (1942) 318 U. S. 363, 369, 63 Sup. Ct. 573, 576, 87 L. Ed. 838, 840. "If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. (Citation of cases.) The fact that the drawee is the United States and the laches those of its employees are not material."

<sup>48</sup>Sec. 17. "(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor."

For section 17(b) of the Act, see *supra*, footnote 14.

benefit is conferred to the government beyond that of preparations preliminary to furnishing war materials.

### *Damages*

Recovery in implied contract has been said to be measured by the amount of the benefit actually conferred.<sup>49</sup> This is generally true, but it is submitted that the measure is not established to be so limited universally. In the instance already given of the government's implied in fact agreement not to commit waste on property under a lease which does not expressly mention waste, it is difficult to find the benefit conferred for which the government is bound to pay. For example, if a government employee negligently handles a steam boiler on the premises so that it explodes, the government's implied obligation is to pay for the destruction and damage done.<sup>50</sup> The government receives no benefit in exchange. Ordinarily, however, benefit to the government is established, and damages in implied contract are limited to payment for the benefit conferred. The boiler case just mentioned does involve damage or destruction proximately incident or consequential to benefits that do exist in a landlord and tenant relationship.

In most cases, the recovery is of the reasonable value of the benefit conferred; and the reasonable value of a benefit is treated ordinarily as being the fair market value. If there is no market value, the value allowed will be the actual cost to the contractor plus a fair percentage of that cost as profit.<sup>51</sup> Where a written contract is attempted but fails for want of following some required

<sup>49</sup>Typical is this from *Gearing v. United States*, (1912) 48 Ct. Cl. 12, 26, "... we think he is entitled to recover on quantum meruit the reasonable value of the work done..." Williston and Thompson, "Williston on Contracts," (Rev. ed. 1937) Sec. 1479, "... restitution of the value of what has been given must be allowed." *G. T. Fogle & Co. v. United States*, (C. C. A. 4th, 1943) 135 F. (2d) 117.

<sup>50</sup>23 Comp. Gen. 477 (1944). *New Rawson Corp. v. United States*, (D. Mass., 1943) 55 F. Supp. 291. In *Clark v. United States*, *supra*, footnote 11 herein, there would have been recovery against the government for the value of a steamer even though it had been wholly destroyed, in the event negligence on the part of the government as bailee for hire had been established.

<sup>51</sup>"... if there is a market value for what the plaintiff is requested to furnish, that value is the measure of the promised price; if there is no market price, the measure is at least the cost or worth from the plaintiff's standpoint..."—Williston and Thompson, "Williston on Contracts," (Rev. ed. 1937) Sec. 1480. In *Douglas Aircraft Co. v. United States*, (1941) 95 Ct. Cl. 140, the amount allowed was the cost to the contractor plus a profit equal to 10% of that cost. If the express contract is good but the price stated in it is not adequate to the contractor, he cannot for that reason alone recover in quantum meruit on an implied contract. *Frazier Davis Construction Co. v. United States*, (1943) 100 Ct. Cl. 120; 3 Comp. Gen. 51 (1923).



statutory procedure, the reasonable value will be considered to be that stated in the written agreement, except where there are facts to throw suspicion on the price stated. If it is tainted by fraud<sup>52</sup> or by an effort to monopolize a market temporarily,<sup>53</sup> the stated price will be disregarded; and if the contractor gives no other evidence of fair value he will not in such case recover anything.<sup>54</sup> In any event the amount recovered will not exceed the stated price.<sup>55</sup>

A case may be conceived of an express contract attempted which fails for mutual mistake but the failure is discovered only after performance by the private party. A bid, for example, may consist of a number of sheets all signed by the bidder who observed only the price stated on the first sheet and failed to detect a lower price stated through clerical error on the last sheet. The contracting officer for the government notices only the low price on the last sheet, makes an award on that basis, and fails to catch the intended figure on the first. Prior to performance, either party could avoid the contract on the ground of mutual mistake. After performance, the express contract still fails for the same reason, but recovery is allowed in implied contract. The contractor's measure of damages is the reasonable value of the benefit conferred, but not in excess of the next highest bid that had been filed.<sup>56</sup> In this way the contractor is limited by what the government would have paid for the item if this contractor had never made a bid.

Later in this article, question will be raised briefly as to any possible difference in meaning between "quantum meruit" or "reasonable value" in implied contracts and "just compensation" under the Fifth Amendment. It is the purpose at this point to consider how the federal courts have treated certain categories of implied in fact contract cases.

### *Gratuitous Claims Statutes*

Not only has Congress waived the immunity of the government from suit against it in some kinds of tort cases. It has provided for the administrative investigation or allowance of other kinds of

<sup>52</sup>Crocker, Trustee of Postal Service Co. v. United States, (1916) 240 U. S. 74, 36 Sup. Ct. 245, 60 L. Ed. 533. Cf. Muschany v. United States; (1945) 324 U. S. 49, 65 Sup. Ct. 442, 89 L. Ed. 492.

<sup>53</sup>14 Comp. Gen. 875 (1935).

<sup>54</sup>Crocker, Trustee of Postal Service Co. v. United States, *supra*, footnote 52.

<sup>55</sup>St. Louis Hay and Grain Co. v. United States, (1903) 191 U. S. 159, 24 Sup. Ct. 47, 48 L. Ed. 130; Gorman v. United States, (1944) 102 Ct. Cl. 260.

<sup>56</sup>Shepard v. United States, (1942) 95 Ct. Cl. 407.

tort claims. For procedural purposes, these claims for administrative determination may be divided into two general categories. In one, departments of the government may investigate claims arising out of torts committed by their officers or employees, after which recommendations are made to the appropriate committee of Congress for further consideration and allowance. In the second category, the department itself both investigates the claims and makes final administrative determination and payment of them.

The first category is illustrated by what has been known as the Negligence Act.<sup>57</sup> It gives authority to the head of each department or independent establishment of the government to determine claims not in excess of \$1,000 for damage to private property caused by the negligence of any officer or employee of the department acting within the scope of his employment. The department certifies such claims to Congress, by practice through the Bureau of the Budget from which they find their way to the Appropriations Committee of the House of Representatives, and Congress provides for final settlement and payment of the claims in a deficiency appropriation statute. While Congress considers larger claims without necessarily a departmental recommendation, the Negligence Act relieves Congress of having to initiate investigations as to small claims or of claimants having to appeal to their Congressmen directly concerning them. The statute is of a distinct public relations value to the various government departments, moreover, by enabling them to contact complaining persons directly and to soothe troubled waters in the field. Congress still determines the ultimate liability and controls the procedure for its determination. The statute covers only claims for privately-owned property and does not cover personal injuries.

The procedure required by the Negligence Act would still entail undue burdens upon Congress as to damages and injuries caused by the great mass of personnel in and accompanying the armed forces as in World War II. Within the War Department, as an example, the Negligence Act was accordingly superseded by legislation generally administered within the Office of The Judge Advocate General. The broadest of these as to persons who can make claims and as to geographical application, often referred to within the War Department as the Military Claims Act,<sup>58</sup> authorizes

<sup>57</sup>42 Stat. 1066 (1922), 31 U. S. C. 215-217.

<sup>58</sup>57 Stat. 374 (1943), 31 U. S. C. 223b, as amended by sec. 4, act 29 May 1945, Public Law 67—79th Congress. Army Regulation, AR 25-25, 29 May 1945.

the Secretary of War or his designee to ascertain and pay claims up to \$1,000 in time of war or \$500 during other times for damage or loss of property or for personal injury or death<sup>59</sup> caused by military personnel or civilian employees of the War Department or the Army acting within the scope of their employment or otherwise incident to noncombat activities. The Military Claims Act further provides that the Secretary of War may report such claims as exceed these amounts to Congress for its consideration. In the event such larger claims are meritorious and otherwise within the terms of the statute, the procedure for consideration by Congress is the same as under the Negligence Act as to claims \$1,000 or under arising within most of the other of the executive departments. Claims not within the terms of either of these statutes are nevertheless allowed by private act introduced usually by one of the claimant's Congressmen. Private claims bills are referred to the Committee on Claims of either the House of Representatives or the Senate as the case may be. Congress, of course, is not precluded from allowing any claim by a private act, whether or not it could be settled by the administrative process, although it seems generally to be a Congressional preference and sometimes a requirement that claimants resort first to judicial or administrative remedies where they have been made available.

There are three other War Department provisions available for the administrative settlement of claims. Where persons subject to military law do damage to private property by riotous, violent, or a *vis et armis* sort of conduct, with a willful disregard probably greater than the normal concept of gross negligence, the Articles of War,<sup>60</sup> making one of these procedures available, provide for deductions from the salaries of the personnel to pay for the damage. The Foreign Claims Act,<sup>61</sup> the second of these provisions, illustrates with added emphasis that statutes authorizing payment of claims against the military services are intended to have a public relations value. It gives authority to both the Secretary of the Navy and the Secretary of War to pay claims for noncombat damage to inhabitants of foreign countries where American troops

<sup>59</sup>The Act limits payment on account of personal injury or death to reasonable medical, hospital and burial expenses.

<sup>60</sup>(AW 105) Stat. 808 (1920), 10 U. S. C. 1577; (AW 89) 41 Stat. 805 (1920), 10 U. S. C. 1561. Language such as that used in the statute calls for more than gross negligence. *Lee v. Latt*, (1934) 50 Ga. App. 39, 177 S. E. 92. AR 25-80, 29 May 1945.

<sup>61</sup>55 Stat. 880 (1942), 57 Stat. 66 (1943), 31 U. S. C. 224d. AR 25-90, 29 May 1945.

are stationed. Under the Foreign Claims Act, claims may be administratively determined and paid up to \$5,000; it is not necessary usually that the American personnel have done their damage within the scope of their employment; and if the inhabitant is a citizen of an enemy nation, he will be paid only after he establishes that he is friendly to the United States. There is, finally, a statute known as the Military Personnel Claims Act of 1945<sup>62</sup> which authorizes the Secretary of War or his designee to pay claims by military personnel and civilian employees of the War Department or the Army where personal property has been lost, damaged, destroyed or abandoned incident to the claimant's service. All of these statutes<sup>63</sup> have been treated within the government as providing for the payment of claims on a pure basis of grace or gratuity. The statutes relating to the military establishment give a wide range of freedom for even the determination by the administrative process of exactly what kinds of claims the departments may choose to allow.

No nation makes any general policy of providing for payment of claims arising from the direct impact of combat, other than to its own personnel. When claims have been pressed by suit against the United States by persons other than certain categories of government officers or employees on a theory of contract implied in fact, the courts have denied relief.<sup>64</sup> The universal position of nations against allowance of such claims is a sufficient circumstance to establish that the United States has never intended to assume their liability by implication, even to its own citizens in the absence of statute expressing a contrary intent. If, in the press of war, the United States impresses property and employees of its citizens into use by the military, however, an intention to pay for their use

<sup>62</sup>Act of 29 May 1945, Public Law 67-79th Congress. AR 25-100, 29 May 1945.

<sup>63</sup>For a general treatment, see Boyd, "War Department Claims," in 6 Fed. Bar Jour. 434 (1945). Colonel Ralph G. Boyd is Chief of the Claims Division in the Office of The Judge Advocate General of the Army. See also Stewart, "Claims by and Against the Government," (1945). The Department of the Navy has further specific claims statutes applicable to that Department.

<sup>64</sup>*Herrera v. United States*, (1912) 222 U. S. 558, 32 Sup. Ct. 179, 56 L. Ed. 316; *Juragua Iron Co., Ltd. v. United States*, (1909) 212 U. S. 297, 29 Sup. Ct. 385, 53 L. Ed. 520; *Perrin v. United States*, (1870) 12 Wall. 315, 20 L. Ed. 412. Officers and soldiers of an invading hostile army are not subject to the laws of the enemy country or amenable to its tribunals—in the event the invasion is successful. *Dow v. Johnson*, (1879) 100 U. S. 158, 25 L. Ed. 632. Enemy are subject to law of nations. *Ex parte Quirin*, (1942) 317 U. S. 28, 62 Sup. Ct. 11, 87 L. Ed. 12; *Ex parte Zimmerman*, (C. C. A. 9th, 1942) 132 F. (2d) 442.

and services will ordinarily be implied rather than an intention to do a wrongful act.<sup>65</sup>

In the case of a noncombat claim of the gratuitous class against the government where an intention appears in a statute to permit payment even though it may sound in tort, question may be raised whether the policy of the statute is a sufficient circumstance to constitute an intention to be bound in implied contract. When once established to provide for payment only as a matter of gratuity and grace, the right to recover by suit in court on the contract theory has been denied.<sup>66</sup> There would seem to be a point in the determination of such claims, however, where an implied contract to pay the claim can finally be made out, although that point has never been established under the specific statutes here mentioned. If usual contract principles can be applied, perhaps by analogy to the subject of refunds in connection with overpayments of taxes, a contractual relationship arises when the person having final authority to settle the claim has approved it for the government and the claimant has agreed to accept the approved amount. At that point there has occurred something equivalent to an account stated be-

<sup>65</sup>During the Civil War, a statute authorized appropriation of property by the government in the suppression of the rebellion. Where a railroad was rightly taken over by the Union forces because it had been employed by the enemy, subsequent use of it by the Union forces was held not a circumstance from which a contract to pay for the use could be implied. The situation when the property was impressed, and not its later use, was important in determining that the transaction was military in character and not contractual. *United States v. Winchester and Potomac Railroad Co.*, (1896) 163 U. S. 244, 16 Sup. Ct. 993, 41 L. Ed. 145. Where no guilt of aid to the rebellion attached to the property but it was impressed into the service because of impending public necessity to suppress the rebellion, recovery in implied contract was allowed. *United States v. Russell*, (1871) 13 Wall. 623, 20 L. Ed. 474. *Kettler v. United States*, (1886) 21 Ct. Cl. 175. If there was no reasonable basis for saying such impending public necessity existed, the officer ordering control over the property and its owner was subject to personal liability, *Mitchell v. Harmony*, (1851) 13 How. 115, 14 L. Ed. 75. Cf. *Korematsu v. United States*, (1944) 323 U. S. 214, 65 Sup. Ct. 193, 89 L. Ed. 202. In *United States v. Pacific Railroad*, (1887) 120 U. S. 227, 7 Sup. Ct. 490, 30 L. Ed. 639, the United States was held not liable for blowing up the railroad's bridges incident to combat; and the railroad company was held not liable for subsequent use of buildings erected without its consent on its lands by the government. As to the rebuilding of the bridges, which the Army wanted the company to do, General Rosencrans said what it is submitted he should be expected to have thought had no words passed: "Gentlemen, the question of liability of the government for repairing damages to this road is one of law and fact and it is too early to undertake the investigation of that question in this stirring time . . . Nevertheless, whatever is fair and right I should like to see done."

<sup>66</sup>*Great Western Serum Co. v. United States*, (1920) 254 U. S. 240, 41 Sup. Ct. 65, 65 L. Ed. 463; *Blagge v. Balch*, (1896) 162 U. S. 439, 16 Sup. Ct. 853, 40 L. Ed. 1032; *Heirs of Emerson v. Hall*, (1839) 13 Pet. 409, 10 L. Ed. 223. No cases on this point appear to have arisen under the specific tort statutes discussed above.

tween private parties. So long as the claimant has received no notice of the action of the approving authority, however, the latter can revoke it. The essentials of an account stated have been said to be the knowledge of the parties and their consent to it.<sup>67</sup>

Where as in the case of the Negligence Act, for instance, it becomes necessary to determine questions of negligence, causation, or contributory conduct to preclude payment, the government departments, by the very gratuitous nature of the statutes, are not bound by *Erie Railroad Company v. Tompkins*, *supra*, as to the law to be applied, whatever it may be. There is a body of federal tort decisions which developed prior to that case and which the plaintiff in that case had hoped would be applied. The administrative practice in handling gratuitous tort claims, however, is to conform customarily to the law of the state where the damage occurs except where a federal statute or specific government department policy may conflict with the law of the situs.<sup>68</sup> Considered from a public relations angle, it may be that it is generally offensive, when federal funds have been made available, for a resident of a state to be denied relief on a theory of law different from that prevailing in that state. On the other hand, if suit in court would be

<sup>67</sup>*Daube v. United States*, (1933) 289 U. S. 367, 53 Sup. Ct. 597, 77 L. Ed. 1261; *Bonwit Teller & Co. v. United States*, (1931) 283 U. S. 258, 51 Sup. Ct. 395, 75 L. Ed. 1018; *United States v. Savings Bank*, (1881) 104 U. S. 728, 26 L. Ed. 908; *United States v. Kaufman*, (1877) 96 U. S. 567, 24 L. Ed. 792; *Braun v. United States*, 98 Ct. Cl. 176, 46 F. Supp. 993; *Midpoint Realty Co. v. United States*, (1941) 95 Ct. Cl. 63, 42 F. Supp. 76. (Refund of customs duties allowed where illegally collected.) *Dooley v. United States*, (1901) 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074. (Drawbacks recovered by exporters on basis of implied contract) *Campbell v. United States*, (1882) 107 U. S. 407, 2 Sup. Ct. 759, 27 L. Ed. 592. (Innocent person's money brought into United States Treasury through fraud of government agent. Sum recovered back in implied contract.) *United States v. State Bank*, (1877) 96 U. S. 30, 24 L. Ed. 647. (Individual wrongfully in possession of government money is liable to the government in *assumpsit*.) *Bayne v. United States*, (1876) 93 U. S. 642, 23 L. Ed. 997. Where the morals of a transaction are such that society would expect repayment, it seems that the courts should interpret the circumstances that repayment is intended, rather than a wrongful appropriation of the sums involved, unless some regulation of the department forbids repayment. Where a tax was paid twice on the same item, the first assessment having been illegal, action in the Court of Claims resulted in the claimant's favor. *Bull, Executor v. United States*, (1935) 295 U. S. 247, 260, 261, 55 Sup. Ct. 695, 700, 79 L. Ed. 1421, 1427, 1428. But cf. *United States v. Minnesota Investment Co.*, (1925) 271 U. S. 212, 46 Sup. Ct. 501, 70 L. Ed. 911.

<sup>68</sup>The rule that contributory negligence bars recovery is so firmly entrenched in federal government administrative practice that it will not be relaxed in a state where doctrines of last clear chance or comparative negligence prevail. The Military Claims Act even specifically provides that no claim may be allowed under it if the damage, injury or death was caused in any part by the negligence or wrongful act of the claimant. For public relations purposes, however, the rule of that sort prevailing in the foreign country where the claim arises is followed under the Foreign Claims Act.

permitted against the federal government for torts done by its employees with government-owned machines operated pursuant to a federal statute, question may be raised whether the same law ought not to be applied in government tort cases as it seems is applied in government contract cases. If a federal statute authorizing such suit also specified certain rules, then clearly they would prevail over rules usually applied in the state where damage or injury shall have occurred.

### *Patents*

Congress provided in 1910 that the United States may be sued in the Court of Claims for patent infringement.<sup>69</sup> Such waiver of immunity from suit may not be found in the Tucker Act, since infringement cases sound in tort.<sup>70</sup> The condition for suit under the patent statute is that the United States use or manufacture a patented invention without license of the owner.<sup>71</sup> Suit may not be commenced under it by one who is in the employment of the United States at the time he makes the claim, or by his assignee. The statute does not apply to any device discovered or invented during the employee's service with the government.

Where the use of the patented device by the government is with the consent of the owner, there is no basis for an infringement suit, but the owner may still have rights under the Tucker Act on

<sup>69</sup>36 Stat. 851 (1910), 40 Stat. 705, (1918) 35 U. S. C. Sec. 250. Suit must be by someone with enough interest in the invention so that under proper facts he could maintain suit against some infringer other than the United States. A mere licensee, for instance, to whom no assignment of a share in the patent has ever been made may not sue under this statute. *Bliss Co. v. United States*, (1926) 225 U. S. 187, 32 Sup. Ct. 626, 56 L. Ed. 1047. This statute in the form in which it was originally enacted in 1910 was held not to confer upon all who contract to perform work for the United States the right to disregard rights of patentees and use their patents without making compensation. *Cramp & Sons v. Curtis Turbine Co.*, (1918) 246 U. S. 28, 38 Sup. Ct. 271, 62 L. Ed. 560. The 1918 amendment was made to protect government contractors against liability for such infringement where use of the patent was done with the government's consent. "The purpose of the amendment was to relieve the contractor entirely from liability of every kind for the infringement of patents in manufacturing anything for the Government and to limit the owner of the patent . . . to suit against the United States . . ."—Taft, C. J., in *Richmond Screw Anchor Co. v. United States*, (1928) 275 U. S. 331, 343, 345, 48 Sup. Ct. 194, 199, 72 L. Ed. 303, 307, 308.

The nature and extent of legal consequences of the expiration of a patent are matters of federal law. *Scott Paper Co. v. Marcalus Mfg. Co., Inc.*, (1945) 66 Sup. Ct. 101, 90 L. Ed. 88.

<sup>70</sup>*Belknap v. Schild*, (1896) 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; *Schillinger v. United States*, (1894) 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108.

<sup>71</sup>The use of the invention must be with the knowledge and consent of the government. *Wood v. Atlantic Gulf & Pacific Co.*, (S. C. Ala., 1924) 296 Fed. 718.

a theory of contract.<sup>72</sup> In the latter case, even government employees may sue. A statute of 1928 authorizes patent by government employees without charge to them whenever an employee's department head certifies that the invention is used or liable to be used in the public interest. In such case, the applicant is obliged to state that the invention may be used by or for the government without payment to him of any royalty.<sup>73</sup> Upon such a statement of intention by him, he would surely be precluded from recovery on a theory of either contract or infringement should the government later use his invention. Even without the 1928 statute, he will be treated as estopped from recovering in contract if he invents with government materials and on government time, and encourages the government to use the invention over a time without a prompt assertion of his right to compensation.<sup>74</sup> By his own conduct, the government may be led to believe the employee does not expect payment; and that fact negatives as well the intention of the government to pay, and precludes recovery in implied contract.<sup>75</sup>

On the other hand, the mere fact that one permits another to use his patented invention or even invites him to do so does not in itself mean that he does not expect to be paid for its use; and under proper facts he can recover.<sup>76</sup> His right thus to recover would seem more clear in a government case where a public officer, acting pursuant to statute and acknowledging the right of a patentee, whether a government employee or otherwise, makes use of the invention without the patentee's consent.<sup>77</sup> There has been an aversion on the part of the federal courts, apparent long prior to the 1910 infringement statute, to holding that the government in using or

<sup>72</sup>*Crozier v. Fried. Krupp Aktiengesellschaft*, (1912) 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771.

<sup>73</sup>45 Stat. 467 (1928), 35 U. S. C. Sec. 45.

<sup>74</sup>*Gill v. United States*, (1896) 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480. If the employee invents partly on government time and the invention is unrelated to the government work to which he is assigned, the government is entitled to use the invention but has no equity to demand a conveyance of the invention. *United States v. Dubilier Condenser Corp.*, (1933) 289 U. S. 178, 53 Sup. Ct. 554, 77 L. Ed. 1114. The right of the government to the invention by one of its employees depends upon the nature of the service the employee is engaged in, and his duty to the government with respect to that service, at the time the invention is made. *Houghton v. United States*, (C. C. A. 4th, 1928) 23 F. (2d) 386. See *Crown Cork & Seal Co. Inc. v. Fankhanel*, (D. Md., 1943) 49 F. Supp. 611.

<sup>75</sup>*Harley v. United States*, (1905) 198 U. S. 229, 25 Sup. Ct. 634, 49 L. Ed. 1029.

<sup>76</sup>*United States v. Palmer*, (1888) 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442.

<sup>77</sup>*Hollister, Collector v. Benedict & Burnham Mfg. Co.*, (1885) 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901.



taking another's property intends to commit a wrong rather than deal on a contract or purchase and sale basis. Conflicting patent claims, however, make it difficult for officers in executive departments to know at times whether they are using another's invention or not. The determination must ultimately be made by the courts anyway. In questionable cases, it would be natural to expect them to go ahead and use the device which the government needs, intending that the government will not pay a claimant for its use if the claimant is not an owner of it but that it will pay if the courts in time should adjudge that he is.<sup>78</sup> The claimant may even cooperate and invite use of the device by the government and still recover in implied contract, though there be no infringement and also though the government officer, while not denying claimant's ownership,<sup>79</sup> asserts himself as dubious about it.<sup>80</sup>

## II

### TAKING UNDER THE FIFTH AMENDMENT

The language of the Tucker Act lends itself to the possible interpretation that it is a consent by Congress to suit against the government for property taken under the Fifth Amendment, simply as an action founded upon the Constitution, without the necessity

<sup>78</sup>This position was reflected in the opinion of Mr. Justice Brewer in *United States v. Berden Fire-Arms Mfg. Co.*, (1895) 156 U. S. 552, 568, 15 Sup. Ct. 420, 425, 39 L. Ed. 530, 535: "The government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner . . . the attitude of the War Department towards inventors in ordnance has been one of neutrality; it has neither denied nor admitted the legal rights, if any there were, of inventors . . . but has proceeded upon the policy that executive officers should not decide upon such claims against the government or upon conflicting claims, but that the claim should be presented without prejudice before some other tribunal than an executive department."

<sup>79</sup>On the other hand, his denial of the claimant's ownership would be tantamount to expression of intention not to pay. The claimant, if he is in fact the owner, would not then recover in implied contract under the Tucker Act but should proceed under the 1910 patent infringement statute. *Farnham v. United States*, (1916) 240 U. S. 537, 36 Sup. Ct. 427, 60 L. Ed. 786.

<sup>80</sup>"There is but one question . . . the attitude of the Ordnance Bureau . . . toward the Leibert patent, whether in recognition of it . . . or . . . in tortious use of it . . . We have in other cases expressed our aversion to the latter conclusion except upon explicit declaration or upon a course of proceedings tantamount to it. A contract, express or implied in fact, must, it is true, be established, but one to pay for a mechanism used will be implied rather than a tortious appropriation of it . . . Where the government uses a patented invention 'with the consent and permission of the owner' and does not 'repudiate the title of such owner,' an implied contract to pay a reasonable compensation for such usage arises . . ."—McKenna, J., in *United States v. Bethlehem Steel Co.*, (1922) 258 U. S. 321, 326, 327, 42 Sup. Ct. 334, 336, 66 L. Ed. 639, 641, 642.

of having to work out a contract between the parties. In this vein, attempt has been made to dissect the Tucker Act into four categories, that it waives the immunity of the government from suit against it, except for pensions, as to cases founded (1) upon the Constitution or federal statute, (2) upon any executive department regulation, (3) upon any government contract, whether express or implied, and (4) for damages in cases not sounding in tort. By this reading of the Act, recovery should be allowed in a case founded upon the Constitution whether or not the taking was tortious.

The statute in its original form, however, did not mention claims founded upon the Constitution.<sup>81</sup> This provision was added when the Tucker Act was amended in 1887.<sup>82</sup> The concept that recovery in a case of taking without condemnation proceedings must be based on contract developed prior to this amendment, and the law as to what constitutes a contract implied in fact had perhaps been stretched a bit, because of the spirit of the Fifth Amendment, in an effort to give the claimant compensation where in justice it was due him. Thus the theory had developed substantially that the right of recovery arose out of implied contract and not from the Constitution.<sup>83</sup> After the 1887 amendment, this theory seems to have been retained in no inconsiderable part and the position of the Supreme Court to be that the words in the Tucker Act, "not sounding in tort," related back to all the categories of claims for which one can sue the government, so that suit could not be brought under the Tucker Act for a cause based upon the Fifth Amendment if it did sound in tort.<sup>84</sup>

Ever since the 1887 change in the Tucker Act, there has been uncertainty on the Supreme Court itself as to whether Fifth Amendment cases can be founded alone upon the Constitution or whether

<sup>81</sup>R. S. 1059, 10 Stat. 612 (1855), 12 Stat. 765 (1863), 14 Stat. 44 (1866).

<sup>82</sup>24 Stat. 505 (1887). At this point, the statute became known as the Tucker Act.

<sup>83</sup>See *Mills v. United States*, (1884) 19 Ct. Cl. 79.

<sup>84</sup>*Basso v. United States*, (1916) 239 U. S. 602, 36 Sup. Ct. 226, 60 L. Ed. 462; *Hooe v. United States*, (1910) 218 U. S. 322, 31 Sup. Ct. 85, 54 L. Ed. 1045; *Schillinger v. United States*, (1894) 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108; *United States v. Jones*, (1888) 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90. But see concurring opinion of Brown, J., in *United States v. Lynah*, (1903) 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, overruled on other grounds in *United States v. Chicago, Milwaukee, St. Paul & Pacific Rd. Co.*, (1941) 312 U. S. 592, 313 U. S. 543, 61 Sup. Ct. 772, 85 L. Ed. 1064. *Merriam v. United States*, (1894) 29 Ct. Cl. 250. In *McArthur v. United States*, (1894) 29 Ct. Cl. 191, claimant was not allowed to waive the tort and sue in contract where the case actually sounded in tort.

a contract must be made out between the parties. The Court itself has divided at times.<sup>85</sup> It has permitted suit to be founded upon the Constitution in one case,<sup>86</sup> and, in a succeeding one, proceeded on a theory of contract.<sup>87</sup> The more recent cases do not out and out repudiate the contract requirement, but they do disregard it and treat only with the constitutional aspects.<sup>88</sup>

Imagining what government officers may think when they take an individual's property away from him is not a particularly satisfying procedure. In *Portsmouth Harbor Land & Hotel Co. v. United States*,<sup>89</sup> Mr. Justice Holmes said that "if the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought or not." That case involved the setting up of heavy coast defense guns by the government on land adjoining the property of the claimant during World War I and aimed for fire control purposes over his land. He claimed that thereby his land was subjected to a servitude. The question was whether the government had done enough so that there was a taking of an interest in his land. If it tested a gun by firing only a few times across his property, that would be a temporary invasion in the nature of a tort. At some point beyond those preliminary shots, the Court concluded, there would be a taking, in which event an implied contract would be established.

Thereafter, in *Jacobs v. United States*,<sup>90</sup> Chief Justice Hughes denied entirely the necessity for making out a contract, saying that "the claim . . . rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty imposed by the Amendment."

Though this pronouncement in the *Jacobs* case may seem the sound one, it is uncertain as to how far the Supreme Court can

<sup>85</sup>*United States v. Lynah*, *supra*, footnote 84, for example.

<sup>86</sup>*Dooley v. United States*, (1901) 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074.

<sup>87</sup>*Portsmouth Harbor Land & Hotel Co. v. United States*, (1922) 260 U. S. 327, 43 Sup. Ct. 135, 67 L. Ed. 287; *United States v. Great Falls Mfg. Co.*, (1884) 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846. Suit cannot lie under the Tucker Act against a privately-owned public utility corporation. The obligation in case of a taking by such a company was treated as constitutional rather than contractual in *Richards v. Washington Terminal Co.*, (1914) 233 U. S. 546, 34 Sup. Ct. 654, 58 L. Ed. 1088.

<sup>88</sup>*United States v. Willow River Power Co.*, (1945) 65 Sup. Ct. 761, 89 L. Ed. 709; *United States v. Commodore Park, Inc.*, (1945) 65 Sup. Ct. 803, 89 L. Ed. 722.

<sup>89</sup>*Supra*, note 86.

<sup>90</sup>*Jacobs v. United States*, (1933) 290 U. S. 13, 16, 54 Sup. Ct. 26, 27, 78 L. Ed. 142, 144. See *Stovall v. United States*, (1891) 26 Ct. Cl. 226.

be relied upon to follow it; and the contract theory in eminent domain cases cannot safely be disregarded.<sup>91</sup> If the government takes by condemnation proceeding or under a requisition statute,<sup>92</sup> the intention to pay is clear. If it does not take by condemnation or requisition, but admits that the claimant owns the land that is taken and yet does not deny that it will pay him, the courts presume an intention to pay rather than a tortious taking.<sup>93</sup> If it floods one's land without apparently knowing whose it is, as would usually occur in flooding cases, surely the owner will be paid whoever he may prove to be. On the other hand, where the government taking is coupled with an express refusal to pay or a claim that the government and not the claimant owns the property, the taking is tortious and no recovery for it is allowed.<sup>94</sup> Where the invasion of the property was not predictable in advance, no promise by the government to pay can be made out of the surrounding circumstances,

<sup>91</sup>Suggesting recovery based on implied agreement: "The implication that by the appropriation of private property to public use the United States undertakes to make just compensation for it (Citation of cases) must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure."—Stone, J., in *Becker Steel Co. v. Cummings*, (1935) 296 U. S. 74, 79, 56 Sup. Ct. 15, 18, 80 L. Ed. 54, 59. "We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe."—Van Devanter, J., in *United States v. Creek Nation*, (1934) 295 U. S. 103, 111, 55 Sup. Ct. 681, 684, 79 L. Ed. 1331, 1336. That it is based on Constitution: *United States v. Certain Parcels of Land in Prince George's County*, (D. Md., 1941) 40 F. Supp. 436. Based on implied contract: *United States v. A Certain Tract in Chatham County*, (S. D. Ga., 1942) 44 F. Supp. 712.

<sup>92</sup>Requisition is generally treated as a summary taking as distinguished from condemnation by court or other proceeding. Both are an exercise of eminent domain and subject to the limitations of the Fifth Amendment. *Fletcher v. Maupin*, (C. A., D. C., 1942) 129 F. (2d) 46, 49; *Benedict v. United States*, (E. D., N. Y., 1920) 271 Fed. 714, 719. Note, "American Economic Mobilization," in 55 *Harv. L. Rev.* 429, 508-518 (1942). U. S. Department of Justice, "Expropriation of Property for National Defense," (1941) 5. Note in 137 *A. L. R.* 1290. Mere taking of lands by requisition pursuant to proclamation of President or Secretary of Labor, as authorized by statute, transfers title to the government. *United States v. McIntosh*, (E. D. Va., 1932) 2 F. Supp. 244, appeal dismissed (C. C. A. 4th, 1934) 70 F. (2d) 507, certiorari denied 293 U. S. 586 (1934); *United States v. Stein*, (N. D. Ohio, E. D., 1921) 48 F. (2d) 626.

<sup>93</sup>*United States v. Buffalo Pitts Co.*, (1914) 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290; *Merriam v. United States*, (1894) 29 Ct. Cl. 250; *Mills v. United States*, (1884) 19 Ct. Cl. 79; *Mason v. United States*, (1878) 14 Ct. Cl. 59.

<sup>94</sup>*United States v. North American Transportation and Trading Co.*, (1919) 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935; *Ball Engineering Co. v. White & Co.*, (1918) 250 U. S. 46, 39 Sup. Ct. 393, 63 L. Ed. 835; *Hijo v. United States*, (1904) 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994. Each of these cases lends support to the conclusion that whether a taking is tortious or contractual is determined as of the time of the taking.

for it could not have known that an invasion was to be made.<sup>95</sup> The intention of the claimant that he be paid, to establish mutuality, can be made out in these various cases by the fact of his making a claim on a contract theory.<sup>96</sup> In a sense, he thereby adopts the transaction as a contract to which he is a party.

While a temporary invasion of the nature heretofore mentioned has been said to defeat recovery in that it is a tort, a partial taking is such an invasion as lets the individual into court. Thus a taking under the Fifth Amendment may be of a piece of the claimant's property, or an easement over it, or some leasehold or any other property interest in it.<sup>97</sup> Firing large guns across one's summer resort property a few times so that his guests leave the disturbance never to return is a temporary tort invasion.<sup>98</sup> On the other hand, if the government occupies the same property for a short while during the winter season when he has no regular guests, that sort of temporary invasion is a taking of a leasehold interest in the

<sup>95</sup>*Horstmann Co. v. United States*, (1921) 257 U. S. 138, 42 Sup. Ct. 58, 66 L. Ed. 171. No reason to expect in advance that the flooding would occur, and not established that the overflow was the "direct or necessary" result of the government structure. *Sanguinetti v. United States*, (1924) 264 U. S. 146, 44 Sup. Ct. 264, 68 L. Ed. 608.

<sup>96</sup>*Great Falls Mfg. Co. v. Attorney General*, (1888) 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527. In *Benedict v. United States*, (E. D., N. Y., 1920) 271 Fed. 714, 719, "A requisition is a one-sided exercise of authority, which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest be entered or not, the obligation to repay is the same." But that Court, while its conclusion may be sound, can be supported only on the theory that the right of recovery was not contractual but arose under the particular requisition statutes involved. Were there no such statute, the Court would be obliged to say the obligation arose under the Constitution, or change its conclusion.

<sup>97</sup>*United States v. General Motors Corp.*, (1945) 65 Sup. Ct. 357, 89 L. Ed. 379; *Duckett & Co. v. United States*, (1924) 266 U. S. 149, 45 Sup. Ct. 38, 69 L. Ed. 216; *United States v. Cress*, (1917) 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746; *United States v. Welch*, (1910) 217 U. S. 333, 30 Sup. Ct. 527, 54 L. Ed. 787; *United States v. Dunnington*, (1892) 146 U. S. 338, 36 L. Ed. 996; *Karlson v. United States*, (C. C. A. 8th, 1936) 82 F. (2d) 330; *National Laboratory & Supply Co. v. United States*, (E. D. Pa., 1921) 275 Fed. 218; *Seabloom v. Krier*, (Minn.) 18 N. W. (2d) 88 (1945); *Petition of Burnquist*, (Minn.) 19 N. W. (2d) 394 (1945); *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702 (1885).

<sup>98</sup>*Peabody v. United States*, (1913) 231 U. S. 530, 34 Sup. Ct. 159, 58 L. Ed. 351. But see by Brandeis, J., in *Hurley, Sec. of War v. Kincaid*, (1935) 285 U. S. 95, 103, 52 Sup. Ct. 267, 269, 76 L. Ed. 637, 642, "... the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the government begins to carry out the project authorized." No recovery where owner of land is only put to expense to ward off consequences of an overflow. *Walls v. United States*, (1909) 44 Ct. Cl. 482.

premises; and the court has jurisdiction to entertain his claim in contract.<sup>99</sup>

The importance of distinguishing between the theories for recovery in Fifth Amendment cases is further illustrated when the government takes property that is mortgaged. Government contracts frequently provide that if the contractor defaults, the government can terminate the contract, take over his machinery and materials, complete the job, and charge the contractor with the cost in excess of the contract price that it takes to complete the work. If the government officers know when they take over the machinery that a third person has a mortgage on some of it, and make no adverse claim for the government, their taking would open the government to suit on either theory.<sup>100</sup> Suppose the chattel mortgage has been duly filed but the government officers do not know. They have notice but not knowledge,<sup>101</sup> and an intention to pay the mortgagee cannot well be made out, unless it could be successfully argued that they should have known and that the rule should be extended to allow recovery on that basis.<sup>102</sup> All that will have occurred is a tort by the government, allowing no recovery under

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<sup>99</sup>*Brand Investment Co. v. United States*, (1944) 102 Ct. Cl. 40; *Alexander v. United States*, (1904) 39 Ct. Cl. 383; *Seabloom v. Krier*, (Minn.-1945) 18 N. W. (2d) 88. See hereinafter under discussion of Depreciation and Moving Expenses.

Taking by government must be for a public use. See Nichols, "The Meaning of Public Use in the Law of Eminent Domain," 20 B. U. L. Rev. 615 (1940).

<sup>100</sup>*United States v. Buffalo Pitts Co.*, (1914) 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290. Where government denied claimant's title, "Under these circumstances, the implication of a contract that the United States would pay, which must be the basis of its liability under the Fifth Amendment, is clearly rebutted. The liability of the Government, if any, is in tort, for which it has not consented to be sued."—Day, J., in *Ball Engineering Co. v. White & Co.*, (1919) 250 U. S. 46, 57, 39 Sup. Ct. 393, 395, 63 L. Ed. 835, 841.

<sup>101</sup>The notice provided for in state recording acts should extend to the federal government as well as to any other person. Even so, the United States is not without its control over titles of both personal and real property within the states. "Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. (Citation of case.) Or the Government may avail itself, as any other lienor, of state recording facilities, in which case, while it has never been denied that it must pay nondiscriminatory fees for their use, the recording may not be the occasion for taxing the Government's property."—Jackson, J., in *United States v. Allegheny County*, (1943) 322 U. S. 174, 183, 64 Sup. Ct. 908, 914, 88 L. Ed. 1209, 1217.

<sup>102</sup>"When the Government has illegally received money which is the property of an innocent citizen . . . there arises an implied contract on the part of the Government to make restitution to the rightful owner . . . The defendant knew at the time, or had reason to know, that Hartzell was serving a sentence for the fraudulent use of the mail in the collection of money for the Drake estate."—*Kirkendall v. United States*, (1940) 90 Ct. Cl. 606, 31 F. Supp. 766.

the Tucker Act on a contract theory. Under the *Jacobs* case, *supra*, however, it would seem that recovery would be allowed. The individual whose property is thus taken is perhaps not wholly without remedy in any event, however, for under some facts he can sue the government officers individually to recover his property which they have wrongfully in their possession.<sup>103</sup>

Lines also become difficult to draw in determining whether a taking has occurred when limitations are imposed upon the use of one's property by the government's exercise of the police or some other power. Distinctions may certainly be felt, however, between a limitation imposed under such a power upon one's own use of his own property and a taking by the government for it use. Zoning ordinances,<sup>104</sup> regulations of billboards,<sup>105</sup> prohibition of liquor

<sup>103</sup>(*Detinue*) *Poindexter v. Greenhow*, Treasurer, (1884) 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185. (*Ejectment*) *Tindal v. Wesley*, (1897) 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137; *Blondet v. Hadley*, (C. C. A. 1st, 1944) 144 F. (2d) 372. The question in each case is essentially whether the officer acted in excess of his authority or under an authority not validly conferred. If the state is an indispensable party, the court will refuse to take jurisdiction against the officer. *Philadelphia Co. v. Stimson*, Sec. of War. (1912) 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; *The Paquette Habana*, (1903) 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900; *American School of Magnetic Healing v. McAnnulty*, (1902) 189 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; *Noble v. Union River Logging Railroad Co.*, (1893) 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; *Stanley v. Schwalby*, (1893) 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259; *Cunningham v. Macon & Brunswick Railroad Co.*, (1883) 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; *Kaufman v. Lee*, (1882) 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; *Nelson v. McKenzie-Hague Co.* (1934) 192 Minn. 180, 256 N. W. 96, 97 A. L. R. 196. On immunity of a government contractor from liability, see note in 19 Minn. L. Rev. 129 (1934). Wrongful act of officer not a taking by the government. *Hughes v. United States*, (1913) 230 U. S. 24, 33 Sup. Ct. 1019, 57 L. Ed. 1374. Wrongful conduct by troops; then no recovery in suit against government, *Lamar, Executor v. Browne*, (1895) 92 U. S. 187, 23 L. Ed. 650; *Garber v. United States*, (1911) 46 Ct. Cl. 503; but recovery may be had under Army claims statutes discussed *supra* under *Gratuitous Claims Statutes*.

<sup>104</sup>State statute limiting heights of buildings held valid. *Welch v. Swasey*, (1909) 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923. Also property setback rules. *State v. Houghton*, (1927) 171 Minn. 231, 213 N. W. 907. Zoning regulations are not contracts. When a residence district develops on basis of a zoning, Congress is free to modify it later to the detriment of surrounding property values. *Reichelderfer v. Quinn*, (1932) 287 U. S. 315, 53 Sup. Ct. 177, 77 L. Ed. 331. Forbidding enlargement of factory in zoned district, *American Wood Products Co. v. Minneapolis*, (D. Minn. 4th, 1927) 21 F. (2d) 440.

Held invalid: Village of Tonka Bay zoning ordinance insofar as it prevented use of strip of shore land for business of renting boats; violation of Fourteenth Amendment, *Dennis v. Village of Tonka Bay*, (C. C. A. 8th, 1945) 151 F. (2d) 411. To prohibit erection of store within a residential district; improper exercise of police power and a taking without just compensation, *State ex rel. Lachtman v. Houghton*, (1916) 134 Minn. 226, 158 N. W. 1017.

<sup>105</sup>*St. Louis Post Advertising Co. v. St. Louis*, (1919) 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599.

sales as a war power measure,<sup>106</sup> requirements of certain safety precautions for the protection of workers,<sup>107</sup> rent controls,<sup>108</sup> all are typical police and war power impositions by the government.<sup>109</sup> Controls of this sort are increasing, and many of them are here to stay. There is no adequate basis in American constitutional history to say, however, that even the need for the individual's property by the government in the interest of war, safety, health, morals or general welfare, will justify its actually taking the property without paying for it.<sup>110</sup> Any taking under the laws of war in international law raises a different category of question.

<sup>106</sup>*Hamilton, Collector v. Kentucky Distilleries*, (1919) 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194. The War-Time Prohibition Act had been passed after the armistice of World War I. The war power, said Mr. Justice Brandeis, "is not limited to victories in the field and the dispersion of the [insurgent] forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

<sup>107</sup>*Plymouth Coal Co. v. Commonwealth*, (1914) 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713.

<sup>108</sup>*Bowles, Administrator v. Willingham*, (1944) 321 U. S. 503, 64 Sup. Ct. 641, 88 L. Ed. 892; *Taylor v. Brown, Price Administrator*, (United States Emergency Court of Appeals, 1943) 137 F. (2d) 654, certiorari denied, (1943) 320 U. S. 787, 64 Sup. Ct. 194, 88 L. Ed. 473. *Block v. Hirsh*, (1921) 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865.

<sup>109</sup>Other property invasions held not a taking: *Mortgage moratorium statute, Home Building & Loan Association v. Blaisdell*, (1934) 290 U. S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413; statute requiring removal of certain fire hazards, *Perley v. North Carolina*, (1919) 249 U. S. 510, 39 Sup. Ct. 357, 63 L. Ed. 735; condemnation by government of right of way over tracks and then obliging railroad at its own expense to maintain flagmen or take other safety precautions, *Chicago, B & Q Railroad Co. v. Chicago*, (1897) 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; statute allowing interested person the right of access to any mine for purposes of inspection or survey, which was treated as a temporary interruption as distinguished from a taking, *Montana Co. v. St. Louis Mining and Milling Co.*, (1894) 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398; blowing up building to stop spread of fire, *Bowditch v. Boston*, (1879) 101 U. S. 16, 25 L. Ed. 980; requirement of old-age assistance liens, *Dimke v. Finke, Director of Social Welfare*, (1940) 209 Minn. 29, 295 N. W. 75; requiring railroad to build a bridge over its tracks for use of public including street railway, *St. Paul v. Great Northern Railway Co.*, (1917) 138 Minn. 25, 163 N. W. 788.

Among other non-compensable property invasions are taxation, and the taking of booty during war in accord with international law. Reasonable laws for the general welfare cannot be headed off by making contracts reaching into the future. *Dillingham v. McLaughlin*, (1924) 264 U. S. 370, 44 Sup. Ct. 363, 68 L. Ed. 742.

Held bad as a taking: Ditch past plaintiff's premises in order to straighten a creek but making access to his premises difficult, *Nalon v. Sioux City*, (1933) 216 Ia. 1041, 250 N. W. 166; regulatory abuse in rate-making, *State v. Tri-State Telephone & Telegraph Co.*, (1939) 204 Minn. 516, 284 N. W. 294; arbitrary and excessive assessment, in re *Mississippi River Boulevard*, (1926) 169 Minn. 231, 211 N. W. 9.

<sup>110</sup>"... while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much



When regulation becomes a taking is a matter of degree. This is illustrated in the case of a taking by the government for its war needs of materials which the owner is under contract to deliver to another. A, for instance, has contracted during wartime to buy from B a quantity of steel at a low price. Before delivery can take place, B's entire production of steel is requisitioned by the government for war purposes, and the government forbids B to comply with the terms of its contract with A. There is a frustration of performance on the contract but no taking from A, and he has no rights under the Tucker Act.<sup>111</sup> The facts can be varied, however, to show that the contract was to build a ship for A, who was to supply the steel to be used in it. With the ship partially completed, the United States requisitions the hull and all materials necessary for its completion, orders B to complete it according to the requirements of the contract, and agrees to pay B on the basis of the contract and reimburse A for payment he has already made on account. A can insist upon more. It was held in *Brooks-Scanlon Corporation v. United States*<sup>112</sup> that he was entitled to the value of the contract at the time of the taking. His compensation was not determinable by the legal title to materials during construction, but by the fact that the government had assumed responsibilities under the contract and had demanded its benefits as effectively as if A had voluntarily assigned the contract to it.

#### *Just Compensation*

The Supreme Court in the *Brooks-Scanlon* case, repeated a general rule it has stated on various occasions, that just compensa-

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upon tradition as upon principle . . . But the question at bottom is upon whom the loss of the changes desired should fall."—Holmes, J., in *Pennsylvania Coal Co. v. Mahon*, (1922) 260 U. S. 393, 415, 43 Sup. Ct. 158, 160, 67 L. Ed. 322, 326.

<sup>111</sup>*Omnia Commercial Co. Inc. v. United States*, (1922) 261 U. S. 502, 43 Sup. Ct. 437, 67 L. Ed. 773, discussed in note on "American Economic Mobilization," 55 Harv. L. Rev. 429, 465 (1942). *Mullen Benevolent Corp. v. United States*, (1933) 290 U. S. 89, 54 Sup. Ct. 38, 78 L. Ed. 192.

<sup>112</sup>(1923) 265 U. S. 106, 44 Sup. Ct. 471, 68 L. Ed. 934. To like effect, *Long Island Water Supply Co. v. Brooklyn*, (1897) 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; *Monongehela Navigation Co. v. United States*, (1892) 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463. Claimant contracted with various persons to construct steam turbines for them. Government requisitioned all the contracts during World War I, and told claimant he would be paid just compensation. After the armistice, government cancelled the contracts. Held, claimant could not recover anticipated profits on the entire transaction as part of just compensation. The Court clearly based compensation on what the government received rather than on what it took from claimant. The Solicitor General had filed his personal statement advising the Court that he felt claimant should be able to recover profits on the requisitioned contracts the same as if they had been made directly with the government. *DeLaval Steam Turbine Co. v. United States*, (1931) 284 U. S. 61, 52 Sup. Ct. 78, 76 L. Ed. 168.

tion under the Fifth Amendment is a sum which will put the claimant "in as good a position pecuniarily as it would have been in if its property had not been taken."<sup>113</sup> Necessarily this rule must preclude recovery for remote inconvenience and damage. One's farm may be taken and a fair price paid for it, for example, but he will not recover for such remote losses as that he cannot buy another farm in the vicinity as productive as his was. This loss is not to be shifted to the government, according to another theory, because it is consequential and the Court has long asserted the further rule that consequential damages are not compensable.<sup>114</sup> By this is meant that recovery may be had only if the invasion by the government is a direct one upon the property. The rule as to consequential damages, easy to quote and therefore to become fixed in the law without adequate reason, was carried over from the earlier simple economic life of the country into the present complex one with a position generally taken that such damages, whether proximate or remote, are not to be allowed.

Instead of simply taking one's farm when it takes real estate, the government is far more likely today than heretofore to render a public utility ineffective, destroy the good will of a business, ruin residential districts, throw employees out of jobs, or put the claimant to additional expenses which are proximate enough but which nevertheless are consequential.<sup>115</sup> If the usual rule of dam-

<sup>113</sup>The measure of compensation, as stated by the Court, bears analogy to tort damage and is the loss caused to the claimant by the taking and not what the taker gains. *Campbell v. United States*, (1924) 266 U. S. 368, 45 Sup. Ct. 115, 69 L. Ed. 328; *United States v. New River Collieries Co.*, (1923) 262 U. S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014; *The Minnesota Rate Cases*, (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511; *Bauman v. Ross*, (1897) 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *Monongehela Navigation Co. v. United States*, *supra*, footnote 112.

On just compensation in general, Orgel on Valuation under Eminent Domain (1936).

On compensation with relation to commandeering of industrial plants, note, "Mobilization for Defense," 50 Yale L. Jour. 250, 274-279 (1940).

<sup>114</sup>Where the shoe is on the other foot and the land of the claimant is benefited by a project, the land owner will be paid less for what is taken because of such benefits. *Black, J., United States v. Sponenbarger*, (1939) 308 U. S. 256, 266, 60 Sup. Ct. 225, 229, 84 L. Ed. 230, 238. In the case of a taking by a railroad, see meaning of special benefits, by Jaggard, J., in *Mantorville Ry. & Transfer Co. v. Slingerland*, (1907) 101 Minn. 488, 494, 112 N. W. 1033, 1036, "They must be special, as distinguished from common . . . ; actual as distinguished from constructive . . . ; substantial as distinguished from speculative . . . ; direct as distinguished from consequential . . . ; and proximate, as distinguished from remote . . . ."

<sup>115</sup>Statutes, therefore, occasionally provide compensation for damage as well as taking. The tendency of the Supreme Court has been to say that the language of the Tucker Act still will not permit of suit for consequential damages. "If the business was destroyed, the destruction was an unintended incident of the taking of the land. There can be no recovery under the Tucker

ages in implied contract cases were to be pursued in cases under the Fifth Amendment, that payment may be only for the benefit conferred upon the government, in most cases all the government would pay for would be the physical property it takes. However, by the broader rule of the Supreme Court that the claimant should be put into a semblance of the position he would have been in pecuniarily had his property not been taken, just compensation must be treated as meaning more than quantum meruit if that is limited to the reasonable value of the benefit conferred upon the government. There is no inconsistency between the extension of benefits for the public good and the moral concept that payment should be made for the property imposed upon much the same as if a voluntary transaction were involved.

The Court recognizes that fair compensation is a matter of some degree of guesswork. It attempts to adopt some arbitrary rules for guidance,<sup>116</sup> but no reason is perceived why the equities of particular cases might not warrant some differences in the application of the rules. Normally, the compensation attempted is the fair market value,<sup>117</sup> "what a purchaser in fair market conditions would have given." If it is land that is involved, and a parcel has been treated as a unit, that fact is considered in determining compensation for the taking of a part or all of it. The Court permits consideration, in determining compensation for a part of the single parcel, of the effect upon the value of the entire remaining portion. However, if the claimant has other separate tracts adjoining that which is taken, the effect of the partial taking

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Act if the intention to take is lacking. (Citation of case.) Moreover, the Act did not confer authority to take a business."—Brandeis, J., in *Mitchell v. United States*, (1925) 267 U. S. 341, 345, 45 Sup. Ct. 293, 294, 69 L. Ed. 644, 648. (Consequential damages recognized), *Ettor v. Tacoma*, (1913) 288 U. S. 148, 33 Sup. Ct. 428, 57 L. Ed. 773. Statute provided specifically for consequential damages, moving machinery to a new location and setting it up there, cost of additional police protection in consequence of carrying on construction work, and limited damages for loss of employment due to the taking of the establishment. *Joslin Mfg. Co. v. Providence*, (1923) 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1167. U. S. ex rel. *Tennessee Valley Authority v. Indian Creek Marble Co.*, (E. D. Tenn., 1941) 40 F. Supp. 811; *Carr v. United States*, (W. D. Ky., 1939) 28 F. Supp. 236.

Marcus, "The Taking and Destruction of Property Under a Defense and War Program," 27 *Cornell L. Quar.* 317, 476 (1942).

<sup>116</sup>Discussion by Mr. Justice Roberts in *United States v. Miller*, (1943) 317 U. S. 369, 63 Sup. Ct. 276, 87 L. Ed. 336.

McCormick, "The Measure of Compensation in Eminent Domain," 17 *Minn. L. Rev.* 461 (1933).

<sup>117</sup>Even though less than claimant had paid for item originally. *Olson v. United States*, (1934) 292 U. S. 246, 54 Sup. Ct. 704, 78 L. Ed. 1236; *Vogelstein & Co. Inc. v. United States*, (1923) 262 U. S. 337, 43 Sup. Ct. 564, 67 L. Ed. 1012.

on those tracts is treated as consequential and hence not compensable.<sup>118</sup> The taking of one tract of land may increase or decrease the market value of neighboring lands in the light of their proximity to the public improvement on the land taken. If the government subsequently determines to take these neighboring lands, it will take them at their value at the time of such taking, provided the neighboring lands were not included within the ultimate project from the beginning. If they were, the owner of the neighboring lands will not be paid an increased value any more than the owner whose land was first taken may now recover on that basis.<sup>119</sup>

It has been said that all factors going to make up market value may be considered. Any probable future use of the premises is admissible in evidence, but it is bad, as being too remote and speculative, to consider possible future uses that are not probable to occur.<sup>120</sup> A gravel pit, or a valuable spring, may be considered as enhancing the value of the land.<sup>121</sup> It is proper to consider the revenue from dairying and farming upon it.<sup>122</sup> Where the land has no market value, the amount of rent, or of income the land has produced and can produce, and the opinions of men who have had experience in dealing in it and are reputed to have knowledge of its value are competent in determining what the property is worth to

<sup>118</sup>Campbell v. United States, (1924) 266 U. S. 368, 45 Sup. Ct. 115, 69 L. Ed. 328; Sharp v. United States, (1903) 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211; Hoeft v. Iowa, (1936) 221 Ia. 694, 266 N. W. 571; Minneapolis-St. Paul Sanitary District v. Fitzpatrick, (1937) 201 Minn. 442, 277 N. W. 394. Damage to well on adjoining property is a taking, United States v. Alexander, (1893) 148 U. S. 186, 13 Sup. Ct. 529, 37 L. Ed. 415.

<sup>119</sup>United States v. Miller, *supra*, footnote 116. The rule has had a varied application, Willink, Executrix v. United States, (1915) 240 U. S. 572, 36 Sup. Ct. 422, 60 L. Ed. 808; New York v. Sage, (1915) 239 U. S. 57, 36 Sup. Ct. 25, 60 L. Ed. 143; Bauman v. Ross, (1897) 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; Great Falls Mfg. Co. v. Attorney General, (1888) 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527.

<sup>120</sup>"... as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."—Field, J., in Boom Co. v. Patterson, (1878) 98 U. S. 403, 408, 25 L. Ed. 206, 208. Monongehela Navigation Co. v. United States, (1892) 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Cameron Development Co. Inc. v. United States, (C. C. A. 5th, 1944) 145 F. (2d) 209; Russell v. St. Paul, M. & M. Ry. Co., (1885) 33 Minn. 210, 22 N. W. 379. Past profits and probable future profits treated as too conjectural, United States v. Meyer, (C. C. A. 7th, 1940) 113 F. (2d) 387. Agreed sale prices in stressful times held not necessarily a measure, McNeil & Sons Co. Inc. v. United States, (E. D. Pa., 1924) 1 F. (2d) 39.

<sup>121</sup>State v. Horman, (1933) 188 Minn. 252, 247 N. W. 4; City of Ely v. Conan, (1903) 91 Minn. 127, 97 N. W. 737; Cameron v. Chicago, M. & St. Paul Railway Co., (1892) 51 Minn. 153, 53 N. W. 199.

<sup>122</sup>United States v. 2,877.37 Acres of Land, (S. D. Tex., 1943) 52 F. Supp. 696.

the owner.<sup>123</sup> Evidence of strategic value is bad, however. The owner of the land may not show that the government just had to have this particular parcel and recover more because of that.<sup>124</sup> As to whether evidence may be introduced of sales of other property similarly located, the states appear to have applied three different rules. One is that it is good evidence; another, that it is entirely inadmissible if there is a market value for the property and except on cross examination to test expertness; and a third, that it is discretionary with the trial court to receive it.<sup>125</sup> The federal law is followed, however, in determining just compensation under the Constitution, and federal courts have stated that it is within the discretion of the trial court to receive evidence of such sales.<sup>126</sup> Whereas some states hold that evidence only of general selling price and not of particular sales may be admissible in determining market value in eminent domain cases, the stated federal rule is that evidence of a recent sale is admissible as bearing on how to put the owner into as good a position pecuniarily as if his property had not been taken.<sup>127</sup>

<sup>123</sup>*Northern Pacific Ry. Co. v. North American Telegraph Co.*, (C. C. A. 8th, 1915) 230 Fed. 347. Where the claimant was a township from whom the United States took a road by flooding it in the raising of the water level of Lake of the Woods, the damages were the cost of building another road. *United States v. Wheeler Township*, (C. C. A. 8th, 1933) 66 F. (2d) 977. How to prove prevailing market price. *United States v. New River Collieries Co.*, (1923) 262 U. S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014.

<sup>124</sup>*United States v. Chandler-Dunbar Co.*, (1913) 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063; *Minneapolis-St. Paul Sanitary District v. Fitzpatrick*, (1937) 201 Minn. 442, 277 N. W. 394; *Application of Union Depot Street Railway & Transfer Co.*, (1883) 31 Minn. 297, 17 N. W. 626.

<sup>125</sup>Cases cited in II Wigmore on Evidence (Third Ed., 1940), Secs. 444, 463 and 464. Wigmore suggests that the practical way of meeting the problem is to allow the trial court in its discretion to exclude such evidence when it involves a confusion of issues, but that otherwise it should be able to receive the evidence. *Contra*, *Minneapolis-St. Paul Sanitary District v. Fitzpatrick*, (1937) 201 Minn. 442, 277 N. W. 394. Note in 14 Col. L. Rev. 171 (1914); Loring, "An Unsettled Point of Evidence," 5 Harv. L. Rev. 232 (1891).

<sup>126</sup>*Jones v. United States*, (1922) 258 U. S. 40, 42 Sup. Ct. 218, 66 L. Ed. 453; *Kerr v. South Park Commissioners*, (1886) 117 U. S. 379, 6 Sup. Ct. 801, 29 L. Ed. 924.

<sup>127</sup>Pennsylvania rule, for instance, is that court shall consider, not particular sales, but only the general selling price in determining market value, *Henkel v. Wabash Pittsburgh Terminal R. R. Co.*, (1920) 213 Pa. 485, 62 Atl. 1085; *Pennsylvania Co. for Insurance on Lives v. Philadelphia*, (1920) 268 P. 559, 112 Atl. 76. Federal Rule. *United States v. Certain Parcels of Land in Philadelphia*, (C. C. A. 3rd, 1944) 144 F. (2d) 626. Not proper to admit evidence of offers received since they can be fabricated too easily, *Sharp v. United States*, (1903) 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211. Resolution of corporation authorized sale to government for \$65,000. Government later condemned, and evidence of the resolution was received over the corporation's objections. *Hanson Lumber Co. Ltd. v. United States*, (1923) 261 U. S. 581, 43 Sup. Ct. 442, 67 L. Ed. 80. Same effect, *Wachovia Bank & Trust Co. v. United States*, (C. C. A. 4th, 1938) 98 F. (2d) 609; *White*

The claimant is entitled to compensation from the time the government takes his property. Interest is allowed from that time, although sometimes it is considered as being interest in an unusual sense. It is treated much as an equivalent for the use of the property by the government until payment is actually made.<sup>128</sup> Mere commencement of a condemnation proceeding is not a taking of the property even though it may make it impossible to sell or improve the property so long as the proceeding is in process.<sup>129</sup> If such a pro-

Oak Coal Co. v. United States, (C. C. A. 4th, 1926) 15 F. (2d) 474. See note in 137 A. L. R. 1290, 1295. Amount of insurance placed on building does not furnish direct evidence of value, but can be brought out in cross-examination for impeachment purposes. Maxwell v. Iowa State Highway Commission, (1937) 223 Ia. 159, 271 N. W. 883. Where options on lands had possibly been obtained by fraudulent representations, and at least were obtained as compromise under threat of condemnation, they are not now admissible in the condemnation proceeding. Central Nebraska Public Power & Irrigation District v. Harrison, (C. C. A. 8th, 1942) 127 F. (2d) 588. Returns for assessment purposes are admissions of value. Minneapolis-St. Paul Sanitary District v. Fitzpatrick, *supra*, footnote 125.

<sup>128</sup> "... the taking in a condemnation suit under this statute takes place upon the payment of the money award . . . . No interest is due upon the award. Until taking, condemnor may discontinue or abandon his effort . . . . Condemnation is a means by which the sovereign may find out what any piece of property will cost."—Reed, J., in Danforth v. United States, (1939) 308 U. S. 271, 284, 60 Sup. Ct. 231, 236, 84 L. Ed. 240, 246. Taking may occur at different times from statute to statute, according to its language. (Declaration of Taking Act) United States v. 17,280 Acres (D. Neb., 1944) 57 F. Supp. 745. No right to payment or interest until taking occurs, Yearseley v. Ross Construction Co., (1940) 309 U. S. 18, 60 Sup. Ct. 413, 84 L. Ed. 554. See Jacobs v. United States, (1933) 290 U. S. 13, 54 Sup. Ct. 26, 78 L. Ed. 142; Brown v. United States, (1923) 263 U. S. 78, 44 Sup. Ct. 92, 68 L. Ed. 171; Bauman v. Ross, (1897) 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; Roberts v. Northern Pacific Railroad Co., (1894) 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; (Shoemaker v. United States, (1893) 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170;) United States v. Johns, (C. C. A. 9th, 1944) 146 F. (2d) 92; United States v. Certain Land in St. Louis, (E. D. Mo., E. D. 1941) 41 F. Supp. 809; United States v. Rogers, (C. C. A. 8th, 1919) 257 Fed. 397; A. Gettleman Brewing Co. v. Milwaukee, (1944) 245 Wis. 9, 13 N. W. (2d) 541. In United States district court under the Tucker Act, interest is not allowable on a \$10,000 judgment, United States v. Salmon, (C. C. A. 5th, 1930) 42 F. (2d) 353.

<sup>129</sup> Determination of an award in condemnation likened to an offer subject to acceptance by the government. The judgment is conditional only. Moody v. Wickard, Sec. of Agriculture (United States, Intervenor), (U. S. Ct. of App., D. C., 1943) 136 F. (2d) 801. The proceeding is legislative, an extension of the legislative power, quasi judicial, State v. May, (1939) 204 Minn. 564, 285 N. W. 834. It is not a civil action within the meaning of the Minnesota Constitution. State v. Rapp, (1888) 39 Minn. 65, 38 N. W. 926. The petitioner in such proceeding in Minnesota is treated as the defendant, and the condemnnee as plaintiff with the right to open and close and having the burden of proof. Minneapolis-St. Paul Sanitary District v. Fitzpatrick, *supra*, footnote 125. Intervention by interested persons allowed. State ex rel Peterson v. Bentley, (1943) 216 Minn. 146, 12 N. W. (2d) 347. While jury trials are customary in other courts in establishing value, the Court of Claims is a legislative court, and not constitutional, so that Congress, despite the Seventh Amendment, properly dispensed with jury trial in suits brought in that Court. United States v. Sherwood, (1941) 312 U. S. 584, 61 Sup. Ct. 767, 85 L. Ed. 1058.

ceeding is commenced and later stopped, the damage, if any, sounds in tort, and suit will not lie against the federal government for it. Moreover, the federal courts have treated such damage as merely consequential.<sup>130</sup> If the proceeding is commenced by a publicly-owned corporation which may be sued in tort, commencement of the proceeding and then the dropping of it has been held not to be malicious prosecution,<sup>131</sup> except that recovery has been allowed where the delay in dismissing the proceeding has been wrongful or unnecessary.<sup>132</sup>

*"Taken, Destroyed or Damaged" under State Constitutions*

The states have been slow to lay themselves open to suit on obligations they ought to pay, although courts have said they are presumed to intend to pay what they owe.<sup>133</sup> On the other hand, some of them have well exceeded the federal government in adopting basic fair principles for protection to the individual upon whose property they have imposed. It has been held that the same eminent domain principles which underlie the Fifth Amendment as to the federal government apply to the state governments under the Fourteenth Amendment.<sup>134</sup> In addition, states

<sup>130</sup>Schoolman v. United States, (1936) 83 Ct. Cl. 410.

<sup>131</sup>Barmel v. Minneapolis-St. Paul Sanitary District, (1938) 201 Minn. 622, 277 N. W. 208, indicating that malicious prosecution arises only by reason of a criminal prosecution or a civil action, and a condemnation proceeding is neither.

<sup>132</sup>Not necessarily based on malicious prosecution. Simpson v. Kansas City, (1892) 111 Mo. 237, 20 S. W. 38.

Proceedings begun, road established, damages awarded, no appeal, but no physical appropriation by county. Held, a taking at this stage. State v. Erskine, (1925) 165 Minn. 203, 206 N. W. 447.

<sup>133</sup>Pound, "A Survey of Public Interests," 58 Harv. L. Rev. 909, 918-920 (1945).

(State's intention to pay) State v. Nelson, (1933) 189 Minn. 87, 90, 248 N. W. 751, 752. (Suability in general) Dunnell, Minnesota Digest, Second Edition, 1928, Sec. 8831. State intervention in suit against Commissioner of Highways to void certain highway projects subjects state to jurisdiction of court to require state to pay plaintiff, out of funds recovered and saved to the state, for reasonable and necessary expenditures and attorney fees for conduct of litigation. Regan v. Babcock, Commissioner of Highways (State, Intervenor), (1936) 196 Minn. 243, 264 N. W. 803. Injunction and mandamus lie against public officials, except that court will not control exercise of discretion. Cooke v. Iverson, (1909) 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415. Local governments may not tax state lands or proceed against them. In re Delinquent Real Estate Proceedings, (1931) 182 Minn. 437, 234 N. W. 691. Minnesota has waived immunity from suit for damages caused by highway location and construction. Laws of Minnesota 1939, c. 420, Sec. 1. Westerson v. State, (1940) 207 Minn. 412, 291 N. W. 900.

<sup>134</sup>Bowles, Administrator v. Willingham, (1944) 321 U. S. 503, 518, 64 Sup. Ct. 641, 649, 88 L. Ed. 892, 905; Hamilton, Collector v. Kentucky Distilleries & Warehouse Co., (1919) 251 U. S. 146, 155, 156, 40 Sup. Ct. 106, 107, 108, 64 L. Ed. 194. The obligation of the state is not less than "just com-

generally have written eminent domain provisions into their own constitutions. While the federal courts have shown tendency to squeeze the protection to the individual by their restrictive application of the rule not allowing consequential damages, the states have sensed the injustice. A large number of them have amended their constitutions so as to guarantee payment in the event of the taking, destruction or damaging of property.<sup>135</sup> Most of these amendments were adopted since 1900. However, a number of them specify that payment shall be in advance of taking. If consequential damages are too conjectural or speculative before a taking or damaging occurs, they may become quite real and definite after the occurrence. In addition to that, states have fortified protection to the individual by further statutory provisions.<sup>136</sup>

Even under such broad constitutional measures, courts have not been without tendency to say that the word "damaged" in state constitutions means little more than "taken" in the Constitution of the United States,<sup>137</sup> and that in any event it does not cover damages that are consequential.<sup>138</sup> The state provisions, however, clearly show an effort to provide for more than the federal Constitution has been interpreted as providing. Otherwise, there would have been no purpose in making the amendments. The states' interpretations of their own constitutions surely will con-

pensation" under the federal Constitution. *United States v. Miller, supra*, footnote 116. A municipality may not invoke the Fourteenth Amendment against the state as to property held for governmental purposes, for a municipality is simply a political subdivision of the state, *Trenton v. New Jersey*, (1923) 262 U. S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937; *Hunter v. Pittsburgh*, (1907) 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151. The Minneapolis park board properly transferred the Minneapolis municipal airport to the state without compensation. *Monaghan v. Armata et al (Minneapolis-St. Paul Metropolitan Airports Commission, Intervener)*, (1944) 218 Minn. 108, 15 N. W. (2d) 241.

<sup>135</sup>For instance, Constitution of the State of Minnesota, Article 1, Sec. 13, as amended November 3, 1896: "Private property shall not be taken, destroyed or damaged for public use, without just compensation first paid or secured." Note that, contrary to the Constitution of the United States, this provision states that compensation or security must precede the taking.

<sup>136</sup>For instance, "The word 'taking' and all words and phrases of like import include every interference, under the right of eminent domain, with the ownership, possession, enjoyment, or value of private property."—Minn. St. 1941, Sec. 117.02, subd. 2 (Mason St. 1927, Sec. 6538).

<sup>137</sup>"The rule prescribed by the Minnesota constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution."—Butler, J., in *Olson v. United States*, (1933) 292 U. S. 246, 254, 54 Sup. Ct. 704, 708, 78 L. Ed. 1236, 1244. *Orgel on Valuation under Eminent Domain* (1936) Sec. 77.

<sup>138</sup>*Transportation Co. v. Chicago*, (1878) 99 U. S. 635, 25 L. Ed. 336.



trol so long as the states guarantee at least as much compensation as the United States Constitution requires to be paid. In Minnesota, as an example, the inclination is to treat eminent domain impositions as tortious rather than contractual.<sup>139</sup> States are now in fact paying consequential damages under at least some guise in the taking, destruction or damaging of private property.<sup>140</sup> Prior to any such amendment, most states, for instance, disallowed claims by property owners where a change in grade of a road in front of their homes would spoil their property.<sup>141</sup> Under such amendments, however, claims for such damage are allowed.<sup>142</sup> The

<sup>139</sup>Minn. St. 1941, Sec. 561.03 (Mason St. 1927, Sec. 9582). *Greenwood v. Evergeen Mines Co.*, (1945) (Minn.), 19 N. W. (2d) 726. Note language of Loring, J., in dissent in *State v. Stanley*, (1933) 188 Minn. 390, 247 N. W. 509.

<sup>140</sup>Under "taken" provision: Railroad built tracks down a Richmond, Virginia, street on which claimant owned a shop. Practically all but pedestrian traffic was obstructed. Damages denied as consequential. *Myer v. Richmond*, (1898) 172 U. S. 82, 19 Sup. Ct. 106, 43 L. Ed. 374.

Under "taken, destroyed or damaged" provision: Highway moved behind claimant's farm house and between his house and barn. Necessary for him to cross highway twice daily to get cattle to pasture. Damages allowed for inconvenience. *State v. Lambert*, (1927) 171 Minn. 369, 214 N. W. 653. Street vacated from a line in front of claimant's property fronting on a blind alley. Damages allowed, though recognized as consequential. Court said rule denying consequential damages had foundation in difficulty of determining precise damages in advance of condemnation. Experience after the injury has occurred facilitates computation of damages. *Vanderburgh v. Minneapolis*, (1906) 98 Minn. 329, 108 N. W. 480; *Underwood v. Town Board of Empire*, (1944) 217 Minn. 385, 14 N. W. (2d) 459. State cut off access of claimant to his farm in construction of broad "free-way" highway with divided roadways. Held, damage payable. *Petition of Burnquist*, (Minn.-1945) 19 N. W. (2d) 394. Recovery for discomfort, depreciation, noxious fumes and unhealthfulness of public dump established near claimant's home. Claimant elected to treat the invasion of his property as permanent. Compensation allowed for taking rather than damage. *Donaldson v. Bismarck*, (1942) 71 N. Dak. 592, 3 N. W. (2d) 808.

No recovery where bridge cut off light and view where claim was in essence for right to view limited only by human vision. Ordinary street car noise is a necessary incident to growth of a community and not compensable. *McCarthy v. Minneapolis*, (1938) 203 Minn. 427, 281 N. W. 759. Distinguish, though, smoke, noise and disturbance ordinarily attending proper operation of railroads at and between stations and its distinction from damage from switch yards, round houses, and other incidental facilities. *Matthias v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, (1914) 125 Minn. 224, 146 N. W. 353.

<sup>141</sup>(When constitution covered taking only) *Willis v. Winona*, (1894) 59 Minn. 27, 60 N. W. 814.

<sup>142</sup>*Apitz v. New Ulm*, (1933) 189 Minn. 205, 248 N. W. 733; *State v. Stanley*, (1933) 188 Minn. 390, 247 N. W. 509; *In re Hull*, (1925) 163 Minn. 439, 204 N. W. 534; *Austin v. Hennepin County*, (1915) 130 Minn. 359, 153 N. W. 738. No difference whether this is first grade or an improvement. *Sallden v. Little Falls*, (1907) 102 Minn. 358, 113 N. W. 884. Jury may consider diversion of travel, inconvenience of access and diminution of business, but not loss of future profits. *James Poultry Co. v. Nebraska City*, (1939) 135 Neb. 787, 284 N. W. 273. Cannot enjoin the improvement. *Dynes v. Town of Kilkenny*, (1922) 148 Minn. 329, 181 N. W. 859, 189 N. W.

consequential aspect fades in importance. The intention was not to enlarge on the substantive law of damages, but it was to make that law uniform so that a property owner might recover against a corporation that has the power of eminent domain under the same circumstances that would have authorized recovery against one not armed with that power.<sup>143</sup> The question becomes increasingly a more realistic one of how to protect the individual against proximate losses in the light of expansions in governmental functions in a complex business age. There is thus a growing consciousness that it is the fair thing to do to spread the burden of the imposition upon the individual's property over the shoulders of the many who receive its benefits so that losses will not fall too heavily on any one. The harshness of the federal attitude is felt more keenly than ever when the federal government extends its functions and compensates on its own concept of constitutional principles and fails to keep pace with the fairer trend developed in the very states where the property imposed upon is situated.<sup>144</sup>

### *Control Over Navigable Waters*

This may be illustrated in cases involving the development and control of navigable waters where there has been considerable incidental and consequential damage in the very states where constitutions require just compensation when private property is "taken, destroyed or damaged" for a public purpose. It is normal to think of one's physical property as being generally the subject of

439, or recover from public officers for changing of grade, *Wallenberg v. Minneapolis*, (1910) 111 Minn. 471, 127 N. W. 422. Even with state highway, city is liable if it participates by approving change of grade, *Maguire v. Crosby*, (1929) 178 Minn. 144, 226 N. W. 398; *Foss v. Montevideo*, (1929) 178 Minn. 430, 227 N. W. 357. When state highway passes through city, state highway commissioner must approve traffic control devices to be used, *Automatic Signal Advertising Co. v. Babcock*, (1926) 166 Minn. 416, 208 N. W. 132.

Road diverts surface waters onto adjoining land. Recovery allowed. *In re Town Ditch No. 1*, (1910) 208 Minn. 566, 295 N. W. 47. Overflows from road cutting through drainage ditch treated as not consequential. *Lage v. Pottawattamie County*, (1942) 232 Ia. 944, 5 N. W. (2d) 161.

<sup>143</sup>*Stuhl v. Great Northern Ry. Co.*, (1917) 136 Minn. 158, 161 N. W. 501, L. R. A. 1917 D, 317.

<sup>144</sup>State law governs in state taking cases, within limits of Fourteenth Amendment. *Marchant v. Pennsylvania Railroad Co.*, (1893) 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751. New rules of federal civil procedure do not apply to federal condemnation proceedings. *United States v. Certain Parcels*, (D. Md., 1941) 40 F. Supp. 436. "The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired."—Hughes, C. J., in *James v. Dravo Contracting Co.*, (1937) 302 U. S. 134, 148, 58 Sup. Ct. 208, 215, 82 L. Ed. 155, 166.

control by the state in which it is situated. The federal government enters the picture in taking or damaging it as somewhat of a stranger. For it to take and compensate less fairly than the claimant's state would have paid had it invaded his property naturally smacks to him of injustice. Because the number of states compensating for taking, destruction or damaging has increased, the subjective feeling of injustice becomes increasingly the practical objective standard throughout the nation. In all parts of the country, it becomes reasonable to conclude that the federal government, through both Congress and the courts, should conform its standard of compensation to changes generally in the national life. The growing control over navigable waters is but a single field in which the Supreme Court has recognized the adaptability of the Constitution to changing concepts of the functions the government may properly perform, but where its concepts of compensation under the Fifth Amendment require some new scrutiny.

The power of the federal government over navigable rivers arises from the commerce clause of the Constitution. The Court had early said that commerce includes navigation.<sup>145</sup> Subsequently it said and repeated that the right of the United States in navigable waters is limited to the control thereof for navigation purposes.<sup>146</sup> This power was further held to include the obstructing and diverting of navigation.<sup>147</sup> Then the concept of the power expanded, and the Court said the mere present non-navigability of a stream does not mean that it may not be made navigable and therefore that the United States may have power to improve or obstruct the water now.<sup>148</sup> When Congress attempted and failed to make the New River navigable, and, though navigability is a factual question and

<sup>145</sup>*Gibbons v. Ogden*, (1824) 9 Wheat. 1, 6 L. Ed. 23. And more recently that it includes motor trucking, (1824) *Madden v. Truckaway Corp.*, (D. Minn. 4th, 1942) 46 F. Supp. 702, and aviation, *State v. Northwest Airlines, Inc.*, (1942) 213 Minn. 395, 7 N. W. (2d) 691; *Erickson v. King*, (1944) 218 Minn. 98, 15 N. W. (2d) 201.

<sup>146</sup>*United States v. River Rouge Improvement Co.*, (1926) 269 U. S. 411, 46 Sup. Ct. 144, 70 L. Ed. 339; *Port of Seattle v. Oregon & Washington Rd. Co.*, (1921) 255 U. S. 56, 63, 41 Sup. Ct. 237, 239, 65 L. Ed. 500, 506.

<sup>147</sup>*United States v. Chandler-Dunbar Water Power Co.*, (1913) 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063; *South Carolina v. Georgia*, (1876) 93 U. S. 4, 23 L. Ed. 782.

<sup>148</sup>*Oklahoma v. Atkinson Co. et al*, (1941) 313 U. S. 508, 61 Sup. Ct. 1050, 85 L. Ed. 1487, Mr. Justice Douglas saying it was sufficient for the Court "that Congress has exercised its commerce power, though other purposes will also be served." *Ashwander v. Tennessee Valley Authority*, (1935) 297 U. S. 288, 56 Sup. Ct. 466, 80 L. Ed. 688. Mississippi is navigable above St. Anthony Falls, *Olson v. United States*, (1934) 292 U. S. 246, 54 Sup. Ct. 704, 78 L. Ed. 1236; *Boom Co. v. Patterson*, (1878) 98 U. S. 403, 25 L. Ed. 206.

both the federal District Court and the Circuit Court of Appeals found that it was not navigable, the Supreme Court reversed them both in *United States v. Appalachian Power Company*,<sup>149</sup> concluded that the federal power over waters was not limited to navigation, and sustained the power of the Federal Power Commission to enjoin a private power company from construction of a dam within the river. It has recognized the authority of the United States in navigable rivers for flood control purposes, and stated that the power of flood control extends to the tributaries of navigable streams, and that the power to promote commerce extends to the non-navigable stretches of a navigable river.<sup>150</sup> The control over navigable streams has not out and out been said to include controls for the sole purpose of conducting governmental power projects. Yet where the statute providing for the Boulder Dam project set forth among other purposes that it was intended to include the promotion of navigation, and it was argued that the mention of navigation was a pure subterfuge by Congress to control the waters for the sole purpose of a government-operated hydroelectric power project, the Court refused to inquire what the actual motives of Congress were.<sup>151</sup>

It is the rule in Minnesota that a riparian owner of land contiguous to a navigable river owns to low water mark.<sup>152</sup> A railroad had laid its tracks between high and low water marks along the Mississippi River in the southern part of the state. The federal government raised the level of the river to improve navigation, and the railroad company was obliged to lay out more riprap to prevent damage to its embankment. The federal rule was applied by the Court, however, and recovery denied against the government on the ground that riparian lands adjacent to a navigable river are subject to the dominant power of the federal government up to

<sup>149</sup>(1940) 311 U. S. 377, 61 Sup. Ct. 291, 85 L. Ed. 243, in which Mr. Justice Reed wrote, "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control."

<sup>150</sup>*Oklahoma v. Atkinson Co., et al*, *supra*, footnote 148.

<sup>151</sup>*Arizona v. California*, (1931) 283 U. S. 423, 51 Sup. Ct. 522, 75 L. Ed. 1154. In connection with the T. V. A. project and the taking of a privately-owned hydro-electric plant, the Court refused to consider authority given by the state to condemn lands for the private project as an element of value, since it was within the power of the state to revoke the authority, whether or not it was probable that the state would revoke it. *U. S. ex rel Tennessee Valley Authority v. Powelson*, (1943) 319 U. S. 266, 63 Sup. Ct. 1047, 87 L. Ed. 1390.

<sup>152</sup>*Minnesota v. Korner*, (1914) 127 Minn. 60, 148 N. W. 617, L. R. A. 1916C 139; *Morrill v. St. Anthony Falls Water-Power Co.*, (1879) 26 Minn. 222, 2 N. W. 842; *Patton on Titles* (1938), Sec. 86.

the high water mark for the improvement of navigation.<sup>153</sup> This will be noted, that the power of the federal government extends to whatever of a claimant's property seems necessary to improve the river for navigation; but if it imposes upon the riparian owner's property below high water mark, it is not liable to pay for it, whereas it must pay for a taking of property above high water mark. This would indicate a limitation upon riparian ownership of property, not a right to take property without paying for it.<sup>154</sup> It is not true that the government is not under obligation to pay merely because it is exercising a constitutional power to improve the river. The government simply does not "take" the claimant's property until high water mark is reached; otherwise it only damages it. Had the state itself made the improvement in this case with the permission of the federal government, it is assumed that the state would be under obligation to pay for damage above the low water point.<sup>155</sup>

The federal rule seems more harsh when the riparian land is owned by an individual, and his way to the water is blocked entirely. Such a claimant owned land on the St. Mary's River in Michigan, having especial value for its easy access to the channel for loading and unloading. The government built a pier on the submerged portion of his land. Not only did this cut off the claimant's access to the stream, but the superintendent of the pier refused to allow him to use the pier in order to get access. The government had not "taken" the claimant's property within the meaning of the Fifth Amendment but had used its own, according to the Supreme Court, and the damage to his land had been merely consequential and accordingly not compensable.<sup>156</sup>

<sup>153</sup>United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., (1941) 312 U. S. 592, 313 U. S. 543, 61 Sup. Ct. 772, 85 L. Ed. 1064. State law as to riparian rights is subject to dominant power of federal government over navigation, Fox River Paper Co. v. Railroad Commission of Wisconsin, (1927) 274 U. S. 651, 47 Sup. Ct. 669, 71 L. Ed. 1279; Fish v. Chicago, Gt. Western Rd. Co., (1914) 125 Minn. 380, 147 N. W. 431. Definition of bed of river, Alabama v. Georgia, (1859) 23 How. 505, 515, 16 L. Ed. 556, 560. Definition of high and low water marks, Tiffany Real Property, Third Ed., 1939, Sec. 661.

<sup>154</sup>For some purposes, navigable waters "are the public property of the nation."—Swayne, J., in Gilman v. Philadelphia, (1865) 3 Wall. 713, 18 L. Ed. 96.

<sup>155</sup>Bradshaw v. Duluth Imperial Mill Co., (1892) 52 Minn. 59, 53 N. W. 1066; Union Depot v. Brunswick, (1883) 31 Minn. 101, 47 Am. Rep. 789. Condemnation of shore premises conveys riparian rights for which compensation must be made, Hanford v. St. Paul & D. R. Co., (1890) 43 Minn. 104, 42 N. W. 596, 44 N. W. 144.

<sup>156</sup>Scranton v. Wheeler, (1900) 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126. No recovery: Government dike substantially destroyed landing place

Among the classics of the earlier river control cases is that of *United States v. Cress*,<sup>157</sup> in which a lock and dam constructed by the United States in a navigable river adversely affected the flow of a tributary non-navigable stream so that the claimant's mill on it could no longer be driven by water power. This, according to the Court, was not a consequential damage. There had been a partial taking, the interest taken being less than the fee. "The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inescapable part of the land."<sup>158</sup>

on island owned by claimant, *Gibson v. United States*, (1897) 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996. Government levee on one side of river caused occasional overflows of claimant's land on other side, *Jackson v. United States*, (1912) 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363. Raised water of river up between low and high water mark so that claimant could no longer drain his land into river, *Mills v. United States*, (S. D. Ga., 1891) 46 Fed. 738. Dredged claimant's salt water oyster beds, *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, (1913) 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083. Bridge once lawfully constructed with permission of state now ordered down by federal government, *Union Bridge Co. v. United States*, (1907) 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523. Same as to wharf, *Greenleaf Johnson Lumber Co. v. Garrison, Sec. of War*, (1915) 237 U. S. 268, 35 Sup. Ct. 551, 59 L. Ed. 947. Erosion of claimant's land caused by revetments constructed in river, *Bedford v. United States*, (1904) 192 U. S. 217, 24 Sup. Ct. 238, 48 L. Ed. 414. Constructed lighthouse on claimant's submerged land under claim of right. Impossible to establish implied contract, *Hill v. United States*, (1893) 149 U. S. 593, 13 Sup. Ct. 238, 48 L. Ed. 414. Wrongfully dug up portions of claimant's land believing it was part of river bed. No implied contract, *Tempel v. United States*, (1918) 248 U. S. 121, 39 Sup. Ct. 56, 63 L. Ed. 162.

Recovery allowed where permanent intermittent flooding of claimant's land, *United States v. Willis* (C. C. A. 4th, 1944) 141 F. (2d) 314; *Pumpelly v. Green Bay Co.*, (1871) 13 Wall. 166, 20 L. Ed. 557. Landowner cannot enjoin members of river commission from making improvements, *Cubbins v. Mississippi River Commission*, (1916) 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041.

<sup>157</sup>243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746 (1917).

<sup>158</sup>To like effect, recognizing a right in the flow of the water under Minnesota law, *Pike Rapids Power Co. v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, (C. C. A. 8th, 1938) 99 F. (2d) 902, cert. denied, (1939) 305 U. S. 660, 59 Sup. Ct. 362, 83 L. Ed. 428, rehearing denied, 306 U. S. 667, 59 Sup. Ct. 487; *Petraborg v. Zontelli*, (1944) 217 Minn. 536, 15 N. W. (2d) 174; *Schaefer v. Marthaler*, (1886) 32 Minn. 487, 26 N. W. 726. See Kinyon, "What Can a Riparian Proprietor Do?" in 21 Minn. L. Rev. 512 (1937) in which that author discusses the "natural flow" and "reasonable use" theories as to flowing water and supports the concept that riparian owners do have a legally protected right in the flow. Supporting "reasonable use" theory, *Minnesota Canal & Power Co. v. Fall Lake Boom Co.*, (1914) 127 Minn. 23, 148 N. W. 561; *Meyers v. Lafayette Club*, (1936) 197 Minn. 241, 266 N. W. 861; *Red River Roller Mills v. Wright*, (1883) 30 Minn. 249, 15 N. W. 167. The state is said to hold the navigable waters for public use; and to that holding riparian ownership is subject, *Nelson v. DeLong*, (1942) 213 Minn. 425, 7 N. W. (2d) 342. Private corporation with authority from Federal Power Commission for hydroelectric power project on navigable

In the *Cress* case, the mill was some fair distance up the tributary from the navigable river. In *United States v. Willow River Power Company*, recently decided,<sup>159</sup> there was involved a privately-owned hydroelectric plant on the non-navigable Willow River but a short distance in from the navigable St. Croix. The drop of the water from the dam was 22.5 feet. The St. Croix flows into the Mississippi; and a dam on that river at Red Wing, Minnesota, raised the level of the St. Croix at the foot of the Willow by three feet and impaired the efficiency of the private plant accordingly. Claim was made only for this impairment and not for any taking of fast lands. The Court of Claims allowed recovery on the ground that there had been a taking. The Supreme Court disagreed, however, and denied recovery. It expressly reaffirmed the *Cress* case. Yet Mr. Justice Jackson stated that the economic interest in the flow of the water involved in the instant case was not legally protectable, and that the doctrine of riparian rights on non-navigable waters was intended to apply especially to waters flowing through pastures, or usable in irrigation, or to shifting courses, and was aimed usually at narrow streams and at settling conflicts between different riparian owners. That sort of stream was involved in the *Cress* case as he viewed it. He pointed out that various economic losses are non-compensable when the government extends its functions, and added that "the Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements . . . It does not undertake, however, to socialize all losses."

At the same time, in *United States v. Commodore Park, Inc.*,<sup>160</sup> it was held that the Fifth Amendment did not require the government to compensate an owner of residential property contiguous to a non-navigable creek for filling the creek with mud and silt dug from a navigable bay into which it flowed. The waters in the creek were made stale and stagnant. The beauty of the property was spoiled. The land, a mile up the creek from the bay, was reduced in value because of the loss of boating, fishing, swimming and the like. The purpose of the dredging had been to provide suitable waters for the Navy for the operation of large seaplanes. It was immaterial, according to Mr. Justice Black, that the law

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river in New York held liable under New York law for effect of project in reducing water head for power at another private corporation's dam, *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, (1929) 280 U. S. 369, 50 Sup. Ct. 140, 74 L. Ed. 483.

<sup>159</sup>(1945) 65 Sup. Ct. 761, 89 L. Ed. 709.

<sup>160</sup>*United States v. Commodore Park, Inc.*, (1945) 65 Sup. Ct. 803, 89 L. Ed. 722.

of Virginia where the land was situated recognized the "technical" title of the claimant to a portion of the non-navigable creek bed.<sup>161</sup>

### *Depreciation and Moving Expenses*

The position of the government that it need not pay for losses caused by it simply because of their being consequential found particular opposition in cases of taking real property where the claimant was left with fixtures on his hands no longer of value to him or where he was put to the expense of moving to other premises. These items, it was argued, should be considered as elements of just compensation for the whole that was taken. While on the New York bench, Judge Cardozo was positive in saying, "It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of secondhand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new."<sup>162</sup>

Nevertheless, most federal courts denied consideration of these items.<sup>163</sup> They constituted losses which the claimant would be obliged to bear himself and which would not be spread by the government. It looked as if the subject would be finally determined, however, in *United States v. General Motors Corporation*.<sup>164</sup> The corporation was renting certain premises under a twenty-year lease, and the government requisitioned the premises for a portion of the term. It would be necessary for the corporation to move out, and later

<sup>161</sup>Cf.: "This riparian right is property and is valuable . . . It is a right of which, when once vested, the owner can only be deprived of . . . for the public good, upon due compensation."—Miller, J., in *Yates v. Milwaukee*, (1870) 10 Wall. 497, 504, 19 L. Ed. 984, 986.

<sup>162</sup>*Jackson v. New York*, (1914) 213 N. Y. 34, 106 N. E. 758. See, also, *Des Moines Wet Wash Laundry v. Des Moines*, (1924) 197 Ia. 1082, 198 N. W. 486.

<sup>163</sup>*United States v. Bechtold Co.*, (C. C. A. 8th, 1942) 129 F. (2d) 473; *Potomac Electric Power Co. v. United States*, (Ct. of App., D. C., 1936) 85 F. (2d) 243, cert. denied in (1936) 299 U. S. 565, 57 Sup. Ct. 27, 81 L. Ed. 416; *Gershon Bros. Co. v. United States* (C. C. A. 5th, 1922) 284 Fed. 849; *Pacific Live Stock Co. v. Warm Springs Irrigation District*, (C. C. A. 9th, 1921) 270 Fed. 555; *United States v. Building*, 651 Brannan Street, (N. D. Calif. S. D., 1944) 55 F. Supp. 667; *United States v. Certain Parcels in San Diego*, (S. D. Calif. S. D., 1944) 54 F. Supp. 561; *United States v. 0.64 Acres*, (S. D. Calif. Central Div., 1944) 54 F. Supp. 562; *United States v. Entire Fifth Floor*, (S. D., N. Y., 1944) 54 F. Supp. 258; *United States v. Improved Premises*, (S. D., N. Y., 1944) 54 F. Supp. 469; *Acme Die-Casting Corp. v. United States*, (1935) 81 Ct. Cl. 415; *Howard Co. v. United States*, (1935) 81 Ct. Cl. 646; *Wrigley, Jr. Co. v. United States*, (1932) 75 Ct. Cl. 569.

<sup>164</sup>(1945) 65 Sup. Ct. 357, 89 L. Ed. 379.



to go to the expense of moving back in again when the government's occupancy had ended. The theory of the government was that it was obliged to pay no more than for the value of the floor space, and that this value would be the same whether the premises were taken while occupied or vacant. The majority on the Circuit Court of Appeals<sup>165</sup> condemned the government theory as hard, on the ground that it was consistent with the benefits the government would receive but not with what was taken from the claimant. The Supreme Court, though divided, allowed recovery for the market value of the term for which the premises were taken and for damage and depreciation of the fixtures, and held that the cost of the claimant in moving equipment may be considered in determining the value of the short term taken. "... the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking," said Mr. Justice Roberts in his majority opinion. It was agreed that the moving expenses thus allowed could not have been considered had the entire fee been taken. Justices Frankfurter and Murphy and Chief Justice Stone took no part in the consideration of the case. Mr. Justice Roberts who wrote the majority opinion is no longer on the Court. Justices Douglas and Black concurred with the majority only in part and disagreed as to reflecting the cost of moving in the award. Mr. Justice Douglas said in fact, "If we allow the offer of proof in the present case, the result will be to let consequential damages in under a new guise."

Insofar as the *General Motors* decision did not deny compensation solely because some form of consequential damage seemed to be involved, it should have a strong appeal to the public's sense of fairness. The case opened the way for another turning point at which the Court could have fit the concept of condemnation compensation to the times<sup>166</sup> even as it had enlarged the concept of the government's power as to the taking aspect in the law of eminent domain. The Circuit Court of Appeals of the 10th Circuit saw no reason for confining the *General Motors* holding to its particular facts. It allowed a similar type of damages in the case of requisition of an entire term of a lease rather than a portion of one. The case went

<sup>165</sup>*General Motors Corporation v. United States*, (C. C. A. 7th, 1944) 140 F. (2d) 873.

<sup>166</sup>See, for adverse criticism but our conclusion, Dolan, "'Just Compensation' and the General Motors Case," 31 Va. L. Rev. 540 (1945). The author of that article is a special assistant to the Attorney General, in charge of all condemnation proceedings by the United States in the Eastern and Southern Districts of New York.

to the Supreme Court on writs of certiorari in *United States v. Petty Motor Company*,<sup>167</sup> however, and that Court determined that in allowing such damages the Court of Appeals had been in error. In delivering the opinion of the Court in this case, Mr. Justice Reed declared:

"The constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of the condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to a good will, the expense of relocation and other consequential losses are refused in federal condemnation proceedings."

The measure of damages in the *Petty Motor Company* case was the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of any right on the part of the lessee to renew the lease, less the agreed rent which the tenant would pay for such use and occupancy.

### III.

#### CONCLUSION

A taking by the government under its power of eminent domain, realistically approached, need not be considered by way either of contract or of tort. The right to take for a public purpose is an incident of sovereignty. The Constitution imposes as a limitation upon its exercise the requirement that just compensation be paid for what is taken. Neither is the taking a wrong, nor "just compensation" capable of being fairly determined on any basis limited<sup>o</sup> to the reasonable value of the property physically taken into possession by the government. The fact of damage or loss, from the angle of fairness, ought neither be admitted in evidence nor excluded on the sole ground that there is damage as distinguished from actual taking or that the element considered is consequential. The question should be, rather, when consequential, as to how remote or proximate it may be.<sup>168</sup> How reasonably real

<sup>167</sup>(1946) 66 Sup. Ct. 596. For Circuit Court of Appeals decision (1945), see 147 F. (2d) 912.

<sup>168</sup>McCormack, "Legal Concepts in Cases of Eminent Domain," 41 Yale L. Jour. 221 (1931).

is the loss resulting from the imposition upon the property by the government so that in fairness compensation should be made to the claimant to put him into as good a position pecuniarily as he would have been in had no imposition upon his property been made?

The Supreme Court has not been oblivious to the fact that there have been harsh results. It has emphasized in the later cases that the remedy lies in the lap of Congress. It is submitted that the Court does have precedent on which to accomplish a fairer result than seems to have obtained already. The onus of the remedy, nevertheless, will have to be provided by statute, and the immediate question is as to what legislation should be enacted.

A general federal statute should be passed to provide, what various state constitutions now provide, that compensation shall be made for the taking, damage or destruction of property for public purpose. The federal government could fit into the fairer trend for determining compensation already developed in a number of the states.

Congress should waive entirely the immunity of the federal government from general tort liability.<sup>169</sup> This position was strongly advocated shortly after the first World War. There was alarm even then at the rate at which the government was taking over functions formerly performed by private enterprise. When tort damage is inflicted by private persons, the injured person may recover; but as the functions of government displace private enterprise, the protection to the individual as to tort damage that may be inflicted upon him increasingly diminishes. The burden can more easily be borne when distributed about to the shoulders of many than when left to lie upon a single innocent injured person. The American Bar Association strongly advocated such legislation, and came extremely close to achieving success.<sup>170</sup> Since Congress is willing to provide for the gratuitous administrative settlement of some tort claims and to have the government sued on some others, it seems no huge departure to provide for payment of all such claims as a matter of right as shall be determined by

<sup>169</sup> Borchard, "Government Liability in Tort," 34 Yale L. Jour. 1, 129, 229 (1924-1925). Suggesting government-owned corporation may even now be sued in tort, *Keifer & Keifer v. Reconstruction Finance Corp.*, (1939) 321 U. S. 503, 64 Sup. Ct. 641, 88 L. Ed. 892. That it may not be sued in tort under stated facts, *Grant v. Tennessee Valley Authority*, (E. D. Tenn., 1942) 40 F. Supp. 564.

<sup>170</sup> Separate bills passed both houses of Congress in the 69th Congress. The Federal Torts Bill was indorsed in principle by the President in his message to the 77th Congress. It was passed by the Senate, but the House did not act on it. It was introduced again in the 78th Congress.

the courts. Data should be available from claims heretofore filed in Congress so that determination can be pretty well made in advance as to what the tort claims for a coming year are apt to be. Recent treatment of financial matters by the government has been such that unpredictability should no longer be alarming even if such claims are not well predictable in advance. If Congress should insist upon further predictability, however, it can limit the amount of tort recovery in the courts for which any one person can sue in a single case, and thus leave it with Congress itself to allow larger claims by special statute.

It is difficult to justify on principle the unwillingness of the government to conform itself to the same moral standards in its transactions as private individuals are held to in transactions between themselves. The rule should not be departed from that the government officer or employee should have actual as distinguished from apparent authority before the government is bound; for there is necessarily a problem in keeping the large mass of government employees within the bounds of proper action. When actual authority is once established, however, no reason is perceived why the United States should not be subject to suit in quasi contract. The present limitation in that regard could easily be remedied by an amendment to the Tucker Act. And in making such amendment, it is suggested that the words "not sounding in tort" be removed from it.

Various of the states, finally, have made some provision for waiving immunity from proceeding against them in some very limited categories of cases.<sup>171</sup> If the constitutional eminent domain provisions of any state are not self-executing so as to waive the immunity of the state from suit in such cases, that state should legislate a general waiver of immunity from such suit. In the interests of uniformity, states which have not done so might well provide, even by general statute, for just compensation for the public taking, damage or destruction of private property. The states should go still further, however, and should provide that they be open to suit against them the same as private persons are,

<sup>171</sup>Pound, "A Survey of Public Interests," 58 Harv. L. Rev. 909 (1945).

"If I were a member of the legislative branch of the government considering the advisability of establishing a court of claims with tort jurisdiction upon existing tribunals as against the state, the reasons advanced by the majority would be persuasive. Functions now performed by the state seem to demand legislation of that character."—Loring, J., (now Chief Justice) in *State v. Stanley*, (1933) 188 Minn. 390, 395, 247 N. W. 509, 511.

whether in contract, express or implied, quasi contract, or in tort.<sup>172</sup>

The theme upon which these conclusions are based is that there is nothing inconsistent between the sovereignty of the federal government or of a state and its liability to suit in court on obligations which, by established legal concepts as between private persons, the government morally ought to pay. It is believed that the fairness, the spirit and the motives by which social and governmental changes are accomplished bear some relationship to their permanency and ultimate success. The position expressed by Mr. Justice Brewer while on the Supreme Court should become more important as government powers and functions are extended, that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."<sup>173</sup>

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<sup>172</sup>Peterson, "Government Responsibility for Torts in Minnesota," 26 Minn. L. Rev. 293, 480, 613, 700, 854 (1942).

<sup>173</sup>*Monongehela Navigation Co. v. United States*, (1892) 148 U. S. 312, 324, 13 Sup. Ct. 622, 625, 37 L. Ed. 463, 467.